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Reargued January 29, 30
March 30 Read Shewn
Harlan Fuller Brown

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THE LAW ASSOCIATION OF PHILADELPHIA.

TRANSCRIPT OF RECORD.

162-197

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~631~~. 321

THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 29, 1894.

(15,494.)

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United States Circuit Court of Appeals for the Second Circuit.

THE INTERSTATE COMMERCE COMMISSION, Complainant and Appellee,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant and Appellant.

Appeal from the circuit court of the United States for the southern district of New York.

[Stamped :] United States circuit court of appeals, second circuit. Filed Mar. 29, 1893. John A. Shields, clerk.

1 In the Circuit Court of the United States for the Southern District of New York. In Equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. —.

To the circuit court of the United States, sitting in equity, within and for the southern district of New York :

Your petitioner, The Interstate Commerce Commission, which was created and established and now exists under and by virtue of an act of Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, as amended by an act approved February 10, 1891, humbly complaining showeth unto your honors that the Pennsylvania Railroad Company is a corporation chartered and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office at Philadelphia, in the State of Pennsylvania ; that the Pittsburgh, Fort Wayne & Chicago Railway Company is a corporation chartered and existing
2 under and by virtue of the laws of the States of Pennsylvania, Ohio, Indiana, and Illinois, having its principal office at Pittsburgh, in the State of Pennsylvania ; that the Pittsburgh, Cincinnati & St. Louis Railway Company is a corporation chartered and existing under and by virtue of the laws of the States of Pennsylvania, West Virginia, and Ohio, having its principal office at Pittsburgh, in the State of Pennsylvania ; that the above-named railroad companies were at the time of the committing of the grievances hereinafter specially set forth and still are common carriers engaged in the transportation of persons and property by their railroads and certain other railroads connecting therewith, extending through several of the United States, under a common control, management, or arrangement for continuous carriage or shipment, and particularly were the above-named railroad companies heretofore, to wit, on the 29th day of November, 1889, and ever since en-

gaged in such business between the city of New York, in the State of New York, Philadelphia, in the State of Pennsylvania, Chicago, in the State of Illinois, and other cities and towns in others of the United States; and as such common carriers were, during all the time aforesaid and still are subject to all the various provisions of said act entitled "An act to regulate commerce" and the said amendments thereto.

That the said above-named railroad companies were heretofore, to wit, on the 29th day of November, 1889, duly impleaded in a controversy not requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, before the said Interstate Commerce Commission upon the complaint of the New York Board of Trade and Transportation, a corporation duly created and existing under and by virtue of the laws of the State of New York, for an alleged violation on the part of the said above-named railroad companies of the provisions of the said act entitled
"An act to regulate commerce," as at large and more fully
3 appears in and by the said petition on file in the office of said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 1.

That thereafterwards, to wit, on the 9th day of January, 1890, the said above-named railroad companies filed their answer to the above-mentioned petition of the said New York Board of Trade and Transportation, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 2.

That thereafterwards, and on the eighth day of February, 1890, it appearing to the said Interstate Commerce Commission upon reading the above-mentioned petition and answers on file, that carriers other than those named as defendants in said petition were necessary and proper defendants therein, the following-named carriers, to wit, The New York Central & Hudson River Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of New York, having its principal office at Albany, in the State of New York; The Michigan Central Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Michigan, having its principal office at Detroit, in the State of Michigan; The Lake Shore & Michigan Southern Railway Company, a corporation chartered and existing under and by virtue of the laws of the States of Pennsylvania, Ohio, Michigan, Indiana, and Illinois, having its principal office at Cleveland, in the State of Ohio; The Chicago & Grand Trunk Railway Company, a corporation chartered and existing under and by virtue of the laws of the States of Michigan, Indiana, and Illinois, having its principal office at Detroit, in the State of Michigan; The Great Western Railway Company of Canada, a foreign corporation doing business in some of the States of the United States by the comity
of those States, having its principal office at Montreal, in the
4 Dominion of Canada, and having and maintaining an office for the transaction of business at Buffalo, in the State of

New York; The New York, Lake Erie & Western Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of New York, having its principal office at New York, in the State of New York; The Chicago & Atlantic Railway Company, a corporation chartered and existing under and by virtue of the laws of the States of Indiana and Ohio, having its principal office at Chicago, in the State of Illinois; The New York, Pennsylvania & Ohio Railroad Company, a corporation chartered and existing under and by virtue of the laws of the States of Ohio, Pennsylvania, and New York, having its principal office at Cleveland, in the State of Ohio; The New York, Chicago & St. Louis Railroad Company, a corporation chartered and existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Indiana, and Illinois, having its principal office at Cleveland, in the State of Ohio; The West Shore Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of New York, having its principal office at Albany, in the State of New York; The Delaware, Lackawanna & Western Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office at New York, in the State of New York; The Grand Trunk Railway Company of Canada, a foreign corporation doing business in some of the States of the United States by the comity of those States, having its principal office at Montreal, in the Dominion of Canada, and having and maintaining an office for the transaction of business at Buffalo, in the State of New York; The Wabash Railroad Company, a corporation chartered and existing under and by virtue of the laws of the States of Michigan, Ohio, Indiana, Illinois, and Missouri, having its principal office at St. Louis, in the State of Missouri; The Baltimore & Ohio Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Maryland, having its principal office at Baltimore, in the State of Maryland; The Philadelphia & Reading Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office at Philadelphia, in the State of Pennsylvania; The Central Railroad Company of New Jersey, a corporation chartered and existing under and by virtue of the laws of the State of New Jersey, having its principal office at Jersey City, in the State of New Jersey; The Boston & Maine Railroad Company, a corporation chartered and existing under and by virtue of the laws of the States of Massachusetts, New Hampshire and Maine, having its principal office at Boston, in the State of Massachusetts; The Louisville, New Orleans & Texas Railway Company, a corporation chartered and existing under and by virtue of the laws of the States of Tennessee, Mississippi, and Louisiana, having its principal office at New York, in the State of New York; and The St. Louis, Iron Mountain & Southern Railway Company, a corporation chartered and existing under and by virtue of the laws of the States of Missouri and Arkansas, having its principal office at St. Louis, in the State of Missouri; were each of them made parties defendant to the proceeding, as at

large and more fully appears in and by said order on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 3.

That on the 24th day of February, 1890, the New York Central & Hudson River Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 4.

That on the 27th day of February, 1890, the Lake Shore & Michigan Southern Railway Company filed its answer to the
6 above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 5.

That on the 1st day of March, 1890, the New York, Lake Erie & Western Railroad Company filed its answer as the lessee operating the New York, Pennsylvania & Ohio Railroad Company to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 6.

That on the 1st day of March, 1890, the New York, Lake Erie & Western Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 7.

That on the 3rd day of March, 1890, the West Shore Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 8.

That on the 3rd day of March, 1890, the Boston & Maine Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 9.

That on the 3rd day of March, 1890, the New York, Chicago & St. Louis Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 10.

7 That on the 5th day of March, 1890, the Philadelphia & Reading Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 11.

That on the 8th day of March, 1890, the St. Louis, Iron Mountain

& Southern Railway Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 12. And thereafterwards on the 10th day of June, 1890, filed an amendment to its said answer, as at large and more fully appears in and by said amendment on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 13.

That on the 10th day of March, 1890, the Central Railroad Company of New Jersey filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 14.

That on the 10th day of March, 1890, the Louisville, New Orleans & Texas Railway Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 15.

That on the 15th day of March, 1890, Volney T. Malott, receiver of the Chicago & Atlantic Railroad Company, filed his answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 16.

That on the 15th day of March, 1890, the Wabash Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 17.

That on the 19th day of March, 1890, the Chicago & Grand Trunk Railway Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 18.

That on the 19th day of March the Grand Trunk Railway Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 19.

That on the 20th day of March, 1890, the Delaware, Lackawanna & Western Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 20.

That on the 20th day of March, 1890, the Michigan Central Railroad Company filed its answer to the above-mentioned petition, as

at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 21.

That on the 21st day of March, 1890, the Baltimore & Ohio Railroad Company filed its answer to the above-mentioned petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 22.

9

That the above-named railroad companies were at the time of the committing of the grievances hereinafter specially set forth and still are common carriers engaged in the transportation of persons and property by their railroads and certain other railroads connecting therewith, extending through several of the United States, under a common control, management, or arrangement for continuous carriage or shipment; and particularly were the above-named railroad companies heretofore, to wit, on the 29th day of November, 1889, and ever since engaged in such business between the city of New York, in the State of New York, Philadelphia, in the State of Pennsylvania, Chicago, in the State of Illinois, and other cities and towns in others of the United States; and as such common carriers were, during all the time aforesaid and still are subject to all the various provisions of said act entitled "An act to regulate commerce" and the said amendments thereto.

And thereafterwards on the 21st day of April, 1890, the Commercial Exchange of Philadelphia, a corporation duly incorporated by the Commonwealth of Pennsylvania for the purpose and object of the advancement of trade and the improvement of the facilities for transacting business in the city of Philadelphia, preferred its petition to the said Interstate Commerce Commission, and asked leave that it might be admitted as a co-complainant with the New York Board of Trade and Transportation in the said cause, as at large and more fully appears in and by said petition on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 23.

And thereafterwards at a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22d day of April, A. D. 1890, an order was issued upon the petition of the said Commercial Exchange of Philadelphia, last above mentioned, as at large and more fully appears in and by the said order of the commission on file in its office, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 24.

10

And on the 21st day of April, A. D. 1890, it having been made to appear that other railroad companies besides those already named as respondents in the said cause were interested in the subject-matter thereof, to wit: The Southern Pacific Company, a corporation chartered and existing under and by virtue of the laws of the State of Kentucky, having its principal office at San Francisco, in the State of California; The Union Pacific Railway Company, a

corporation chartered and existing under and by virtue of the laws of the United States, having its principal office at Boston, in the State of Massachusetts; The Northern Pacific Railroad Company, a corporation chartered and existing under and by virtue of the laws of the United States, having its principal office at New York, in the State of New York; The Canadian Pacific Railway Company, a foreign corporation chartered and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Montreal, in the Dominion of Canada, and having and maintaining an office for the transaction of business at Detroit, in the State of Michigan; The Texas & Pacific Railway Company, a corporation chartered and existing under and by virtue of the laws of the United States, having its principal office at New York, in the State of New York; The Illinois Central Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Illinois, having its principal office at Chicago, in the State of Illinois; The Lehigh Valley Railroad Compony, a corporation chartered and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office at Philadelphia, in the State of Pennsylvania; an order was issued requiring
11 each of said last-named railroad companies to file with the commission a verified statement as at large and more fully appears in and by said order on file in the office of said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 25.

And thereafterwards on the 7th day of May, 1890, the Canadian Pacific Railway Company filed its letter and subsequently thereto, to wit, on the 10th day of June, 1890, its verified answer in compliance with the above-recited order, dated April 21st, 1890, as at large and more fully appears in and by said letter and answer on file in the office of the said commission, copies whereof are hereunto annexed and made a part of this petition, the same being marked Exhibit 26.

And on the 13th day of May, 1890, the Southern Pacific Company filed its answer in compliance with the above-recited order dated April 21st, 1890, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 27.

And on the 14th day of May, 1890, the Northern Pacific Railroad Company filed its answer in compliance with the above-mentioned order dated April 21st, 1890, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 28. And on the 10th day of June, 1890, the said Northern Pacific Railroad Company filed its amended answer as at large and more fully appears in and by said amendment on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 29.

And on the 14th day of May, 1890, the Lehigh Valley Railroad

Company filed its answer in compliance with the above-mentioned order dated April 21st, 1890, as at large and more fully appears in and by said answer on file in the office of the said commis-
12 sion, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 30.

And on the 19th day of May, 1890, the Union Pacific Railway Company filed its answer in compliance with the above-mentioned order dated April 21st, 1890, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 31.

And on the 21st day of May, 1890, the Illinois Central Railroad Company filed its answer in compliance with the above-mentioned order dated April 21st, 1890, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 32.

And on the 29th day of May, 1890, the Texas and Pacific Railway Company filed its answer in compliance with the above-mentioned order dated April 21st, 1890, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 33.

That the above-named railroad companies were at the time of the committing of the grievances hereinafter specially set forth and still are common carriers engaged in the transportation of persons and property by their railroads and certain other railroads connecting therewith, extending through several of the United States, under a common control, management, or arrangement for continuous carriage or shipment; and particularly were the above-named railroad companies heretofore, to wit, on the 29th day of November, 1889, and ever since engaged in such business between the city of New York, in the State of New York, Philadelphia, in the State of Pennsylvania, Chicago, in the State of Illinois, and other cities
13 and towns in others of the United States; and as such common carriers were, during all the time aforesaid and still are subject to all the various provisions of said act entitled "An act to regulate commerce" and the said amendments thereto.

That thereafterwards the said cause being at issue upon the pleadings aforesaid, the said cause duly came on for investigation and hearing before the said Interstate Commerce Commission duly and legally assembled for that purpose at the city of Washington, in the District of Columbia, on the 10th day of June, A. D. 1890, and days subsequent thereto, when the said complainants as well as the said defendants duly appeared by their officers and attorneys, and The San Francisco Chamber of Commerce having appeared by counsel at said hearing and requested permission to enter as a party complainant in the said cause, and leave so to do having been thereupon granted, the said San Francisco Chamber of Commerce duly entered and appeared as a party complainant, and thereupon the said cause proceeded to hearing and determination.

That at the said hearing it was made to appear to the satisfaction of the said commission that certain of the said defendants had violated the provisions of the said act entitled "An act to regulate commerce," as was stated to have been violated by them in the said petition hereinbefore referred to as a part hereof, and thereupon said commission on the 29th day of January, 1891, duly and legally determined the matters and things in controversy and at issue between said parties, and made a report in writing in respect thereto, which included the findings of fact upon which the conclusions of the said commission were based, as at large and more fully appears in and by the report of the determination of the said commission in regard thereto, on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 34.

That thereafterwards and forthwith, upon the determina-
14 tion of the said cause as aforesaid, to wit, on the 29th day of January, 1891, the said commission duly formulated an order and notice in relation to the matters and things stated and charged in the said petition based upon the findings and determination of the said commission with respect thereto, agreeable to the requirements of the statute in such case made and provided, which said order now remains in full force and effect, never having been vacated, set aside, altered, modified, or changed in any respect whatever, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit 35.

Afterwards, to wit, on the 28th day of March, 1891, the said commission, agreeable to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report in respect thereto, as aforesaid, together with the order and notice aforesaid, to be delivered to the said defendants.

And thereupon the petitioner shows that it has not been made to appear to the said commission that said defendants have ceased and desisted from the violations of law set forth in the said report and order of the said commission, but on the contrary thereof, the said defendants, unmindful of their duty in that regard and of the decision and determination of the said commission, as stated in its report, as aforesaid, have through their officers, servants and attorneys wholly disregarded and set at naught the authority and order of the said commission in that regard, and have wilfully, and knowingly violated and disobeyed the said order, and have from the time of the issuance and service of said order and notice as hereinbefore set forth, hitherto wholly neglected and refused and still do neglect and refuse to comply with the same, in this, that the said defendants did not thereupon wholly cease and desist from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any ports of entry in a foreign country adjacent to the United States, upon through
15 bills of lading and destined to any place within the United States upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such places of destination,

or at any other than the same rates established in said published inland tariff for the carriage of other like kind of traffic, in the elements of bulk, weight, value, and expense of carriage, but have since continued to charge, collect, and receive from shippers and consignees freight rates which were in and by the said order last above set forth declared to be illegal.

And by way of specification, showing that the said defendant, since the issuance and service of the order hereinabove set forth, charges, demands, collects and receives freight rates which have been declared to be unlawful in and by the said order of the said commission, there is annexed to this petition, as a part thereof, a table, marked "Exhibit 36," correctly compiled from the official tariff sheets of the said defendant and by it filed in the office of the said Interstate Commerce Commission, as required by the said act to regulate commerce, showing that the said defendant, as to charges for through freight, and as to the divisions thereof for ocean and inland carriage, destined inland through the port of New Orleans, in the State of Louisiana, and the freight rates to the same inland points on domestic traffic originating at said port, are not in conformity with the said order, but on the contrary are a wilful disobedience thereof.

And the petitioner further shows that it is informed and believes, and therefore so states the fact to be, that the amount of freight rates charged by the said defendant to shippers upon traffic covered by the said order of the Interstate Commerce Commission as aforesaid, and since the service thereof on the said defendant, has been largely in excess of the sum of two thousand dollars.

16 Wherefore the petitioner prays—

1. That a subpœna or other suitable process may issue according to the course of equity, requiring the said The Texas & Pacific Railway Company to appear at such time and place as this honorable court may determine, then and there to make full, complete, and perfect answer to all the matters and things, hereinabove stated and charged as fully and particularly as if the said company were distinctly and specially interrogated in regard thereto, said answer not to be verified by oath, said verified answer being hereby specifically waived.

2. That upon the filing of this petition an order may be passed by this honorable court directing the method of service of notice of the pendency of this proceeding.

3. That such order or orders may be passed pending the cause as will secure a speedy hearing and determination of the matters and things stated and charged in the foregoing petition.

4. That such order or orders may be passed pending the cause as may be necessary for the prosecution of all such inquiries as the court may think needful to enable it to form a just judgment of the matters and things stated and charged in the foregoing petition.

5. That an order may be entered pending the cause granting to the petitioner a writ of injunction or other proper process, mandatory or otherwise, to restrain the said defendant, its officers, servants, and attorneys, from further continuing in their violations of and

disobedience to the said order of the said commission, and that upon final hearing such injunction may be made perpetual.

6. That a decree may be entered, if it shall seem meet to this honorable court, requiring the said defendant to pay such
17 & 18 sum of money, not exceeding the sum of five hundred dollars, for every day after a day to be named in said decree that it shall fail to obey the said injunction or other proper process.

7. For such other and further relief in the premises as to the court may seem meet and the equities of the petitioner's cause may require.

THE INTERSTATE COMMERCE COMMISSION,
By EDW. A. MOSELEY,
The Secretary Thereof, Thereunto Duly Authorized.

Counsel:
EDWARD MITCHELL,
U. S. District Attorney, New York City.
SIMON STERNE,
29 *William St., New York City.*
JOHN D. KERNAN,
10 *Wall St., New York City, Associate Counsel at Request of New York Board of Trade and Transportation.*

19 EXHIBIT 1.

Petition.

20 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, Fort Wayne and Chicago and The Pittsburgh, Cincinnati and St. Louis Railroads.

Petition.

To the honorable the Interstate Commerce Commission:

The New York Board of Trade and Transportation, a corporation duly created and existing under the laws of the State of New York and located in the city of New York, composed largely of merchants engaged in foreign and domestic commerce, respectfully petitions your honorable body that you will hear and determine the complaints of your petitioner as hereinafter set forth pursuant to the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended. Upon information and belief the complainants allege—

First. That the defendants have been and are railroad corporations engaged as common carriers in the transportation of property between New York, Philadelphia, and Chicago and other Western

points; such transportation being in all cases under some common control, management or arrangement for continuous carriage between the points aforesaid, so that each of the defendants constitutes a part or portion of some through and continuous line of transportation so engaged as aforesaid under a joint tariff, and is, as to said transportation, within the provisions of the act
21 as amended. That since April 4th, 1887, the defendants, in violation of said act, have been and are guilty of unjust discriminations, in that they have been and are in the habit of charging their regular tariff rates upon property when delivered to them at New York and Philadelphia for transportation to Chicago and other western points, while charging other persons rates much lower and even as low as fifty per cent. thereof for a like and cotemporaneous service under substantially similar circumstances and conditions when the property was or is delivered to them at New York and Philadelphia by vessels and steamship lines under through bills of lading, from foreign ports and foreign interior points, issued under common arrangement between the defendants and such vessels and steamship lines and foreign railroads for continuous carriage at joint rates from the point or port of shipment to said Chicago and other western points; the defendant's share of such through rate for the inland transportation has been and is, as aforesaid, lower than its regular tariff rates (being in some cases as low as fifty per cent. thereof), and therein in each instance constitutes an unjust discrimination under the act aforesaid.

22 The following table shows rates charged per 100 lbs., &c., in cases where imports were carried by the American line to Philadelphia:

Date—bill.	Points.	Goods.	Through rate.	Rail & ocean to Phila.	Inland, Phila. to Chicago.	Tariff, Phila. to Chicago.
1888.						
June 25	Dumfer-line, Scott, to Chicago...	Linens.....	76.40 cts...	44.50 cts...	31.90 cts...	69 cts.
1889.						
March 4	" " "	"	88 " ..	42 " ..	46 " ..	" "
July 1	" " "	"	80 " ..	40 91 " ..	39.09 " ..	" "
June 25	Liverpool to Chicago.....	Anvils.....	29.47 " ..	8.42 " ..	21.05 " ..	33 "
Feb. 27	" "	"	26.79 " ..	8.42 " ..	18.37 " ..	" "
April 15	" "	Tin plate..				
June 17	" "	Tin plate, C. L.	24 " ..	8 " ..	16 " ..	28 "

23 The said defendants have failed and do fail to state in their published tariffs or in such through bills of lading the inland charge separately from the ocean and other charges in order to prevent ascertainment of the actual inland rates; that the Pennsylvania Railroad Company is an owner of, or interested in the management and operation of, steamship lines running from New York and Philadelphia to foreign ports, and under the opportunity thus afforded to it of fixing these through rates from foreign ports and points to inland American points, it is enabled to and does practice the unjust discriminations complained of, in connection with the other defendants in such a way as to make full ascertainment of

the facts involved very difficult, and, therefore, the complain-t asks that the board shall cause a full discovery thereof to be made.

Second. That by reason of the facts hereinbefore charged, the defendants have made and given, and do make and give, undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities interested in the transportation of imported traffic from the seaboard under such through bills of lading, and have subjected and do subject persons, companies, firms and corporations in and about New York and Philadelphia and those localities, to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and contemporaneous service under substantially similar circumstances and conditions; that there are no conditions or circumstances relating to the transportation of imported traffic which justify any difference in rates between imported traffic transported to any place in the United States from a port of entry, and other traffic from such ports; that the inland published tariff must by law be the same for all such freights.

Third. That the facts aforesaid constitute a violation of sec. 4 of said act as amended, in that defendants have charged
24 and received and do charge and receive a greater compensation for transportation from the seaboard to interior points, than under such through bills of lading they receive upon imported traffic carried to more distant interior points, as will appear from an examination of the tariff rates published and maintained by defendants.

Wherefore, the complainant respectfully asks that the honorable Interstate Commerce Commission shall investigate the matters herein complained of, and shall obtain from the defendants full and complete information in regard thereto, and shall then adjudge and determine:

1. That in the particulars complained of the defendants have violated and are violating the "act to regulate commerce," approved February 4, 1887, as amended.

2. That imported traffic, transported to any place in the United States from a port of entry, is required by law to be taken on the inland tariff governing other freights.

3. That defendants be compelled to comply with the law and with the orders of the commission by the methods and under the penalties, provided that the published tariffs shall show the through rate and the inland proportion and the amount thereof charged upon imported as upon other traffic, and that in such through bill of lading the amount of the through rate charged for inland service shall be separately stated from other charges.

4. That the complainant may have such other and further relief as may seem to your honorable commission just and proper.

JOHN D. KERNAN,
Counsel for Complainant, 10 *Wall St., N Y.*

25 & 26 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Francis B. Thurber, being duly sworn, says: that he is a member of the New York board of trade and transportation, and of the committee on railway transportation appointed to take charge of and investigate the complaints alleged in the foregoing petition; and that the allegations of said petition are true according to his best knowledge, information and belief.

(Signed) FRANCIS B. THURBER,
Chairman Committee on Railroad Transportation of N. Y. Board of Trade and Transportation.

Sworn to before me this 29th day of November, 1889.
ALEX. WILEY,
Notary Public, N. Y. Co.

27 EXHIBIT 2.

Joint Answer of the Pennsylvania Railroad Company, Pittsburgh, Fort Wayne & Chicago Railway Company, and Pittsburgh, Cincinnati & St. Louis Railway Company.

28 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURG, FT. Wayne and Chicago, and the Pittsburg, Cincinnati and St. Louis Railroads.

The joint and several answer of the Pennsylvania Railroad Company, the Pittsburg, Ft. Wayne and Chicago Railway Company, and the Pittsburg, Cincinnati and St. Louis Railway Company to the complaint filed in the above-stated case.

The defendants cannot be advised as to the character of the complainant, nor as to the authority of the parties claiming to proceed in its behalf, and, asking that the complainant be held to proof thereof, for answer to so much of the complaint as they are advised it is necessary for them to make answer unto, say:—

First. The defendants admit that they are common carriers, substantially as stated in the first section of the first paragraph of the complaint, except that the railway of the Pittsburg, Ft. Wayne and Chicago Railway Company is operated by the Pennsylvania Company. These defendants, however, deny that they are guilty of unjust discrimination, or that they have violated section 4 of the act to regulate commerce as amended, according to its true spirit and purpose, as they are advised; and they also deny that either of them is interested in the management and operation of steamship lines running from New York and Philadelphia to foreign ports.

The Pennsylvania Railroad Company is, however, the owner of capital stock and bonded indebtedness of the International
29 Navigation Company to the extent of less than one-sixth of the entire aggregate of such capital stock and indebtedness. The said International Navigation Company is interested in several lines of steamships between Philadelphia and New York to foreign ports; but the Pennsylvania Railroad Company takes no part in, nor does it assume any control or supervision of, nor does it claim or exercise any exceptional facilities with reference to, said steamships by reason of said stock and bond ownership. The said stock was received in exchange for the transfer to said International Navigation Company of four steamships owned by the American Steam ship Company, the entire stock of which was held by the Pennsylvania Railroad Company, which steamships, being operated at a loss, were sold to the said International Navigation Company.

Second. The defendants admit, that under an arrangement expiring on the first day of October, 1889, which had continued for a considerable period, the defendant companies formed with certain ocean steamship lines through routes, and, by means thereof, were engaged in connection with said steamship lines as common carriers in the transportation of property under a common arrangement for a continuous carriage between points in Europe and the city of Chicago, and other western points in the United States, by way of New York and Philadelphia; and the defendants say that by the universal practice of carriers constituting a through route under a common control, management, or arrangement for continuous carriage, the initial carrier fixed the rate, and the subsequent carriers, under that practice, did not file tariffs of rates for through shipments. The defendants also admit that they did receive as their portion of the through rate, a less amount than their full inland rate, but say that if the statement contained on page 3 of the complaint is correct, in the special instances there set forth, so far as the through rate is concerned (which is not admitted), yet the divisions
30 therein shown credit the defendants with a less sum than was actually received. But the defendants aver that said rates, so far as they are correctly stated, represent exceptional instances of extreme low rates, the current and prevalent rates approximating more closely the sum of the inland and ocean rates.

Third. The defendants are advised that the acceptance of a proportion for the inland carriage less than the local inland rate was necessary and may be justified as follows:—

(*a.*) That a less sum may be received for a continuous passage over several lines than the sum of the local rates of all the parties to the carriage, is well founded in principle, and has equal application, whether all the lines forming such through route be within the limits of the United States, or whether a portion of the route, or some carriers parties thereto, be beyond those limits.

(*b.*) The route constituted by the arrangement between the defendants and the steamship lines referred to above, between Liverpool and Chicago, consists of approximately thirty-four hundred miles of ocean from Liverpool to Philadelphia and New York; and approxi-

mately eight hundred and fifty miles of rail entirely within the United States. In competition with the routes constituted as above, there existed and exists a route via Montreal. The distance from Liverpool to Chicago, by way of Montreal, is substantially the same, the ocean mileage from Liverpool to Montreal being about thirty-four hundred miles, and the inland distance from Montreal to Chicago being about eight hundred miles. By this latter route, however, five hundred of the said eight hundred miles is upon Canadian railroads, not subject to the jurisdiction of this honorable commission, and only three hundred miles upon lines of railroads within the limits of the United States, namely, from Detroit to Chicago.

31 The line via Montreal also has a complete and independent water route from Montreal to Chicago—that is to say, by way of the Merchants' line of propellers, operating a weekly line of boats during the season between Montreal and Chicago, through the St. Lawrence river, the Welland canal, and the Great Lakes, which said Merchants' line of propellers is seeking and has sufficient capacity to carry an important part of the import traffic destined to Chicago and points west that would be delivered to it by the ships landing at Montreal. The agents in Europe of the said route to Chicago via Montreal, competing with the agents of the defendants' through line to the same point, tendered to the shippers the option of movement from Montreal, either by the railroad via Detroit or by the water route via the Merchants' line of propellers, and constantly bid for said traffic at a through rate lower than that fixed contemporaneously by the defendants' through line, as aforesaid; and that the reductions in the through rate, which resulted in bringing the inland rate accepted by the defendants' through line below a sum which would allow the defendants their full inland rate for the carriage of such traffic, have been rendered necessary in order to obtain traffic via New York and Philadelphia as against the competition of the said Montreal line.

(*c.*) As a circumstance cited, not as justifying the defendants' action as standing alone, but as showing that the water and Canadian competition referred to affected other carriers as it did the defendants, the defendants aver that the competing lines of railroad from the seaboard to interior points have constantly, through the agents of their connecting water lines to Europe, bid as low and lower rates on the same character of traffic as were accepted by defendants; and, on information and belief, the defendants charge that the said competing lines accepted, and accept, a less amount as their proportion for the inland carriage of their import traffic than they charge and receive on their inland traffic between the same points.

32 Fourth. These defendants aver that the said through route, and the division of the rate thereon, were, for the reasons hereinbefore stated, justified under the law; and in this behelf they invite the judgment of the honorable commission. Inasmuch, however, as any order which might be made restrictive in the future of the practices by the defendants as herein admitted, would work great and unjust prejudice to these defendants, unless all the com-

petitive lines from the seaboard inland were also in like manner restrained and restricted, the defendants suggest to the honorable commission that, under their ample powers in this behalf warranted, they cause the said carriers by competitive routes to be made parties to this inquiry.

Wherefore the defendants pray that the complaint in this case be dismissed.

(Signed) JOHN SCOTT,
JAMES A. LOGAN,
Counsel for the Pennsylvania Railroad Company and Pittsburg, Cincinnati & St. Louis Railway Company.

STATE OF PENNSYLVANIA, }
City of Philadelphia, } *ss:*

William H. Joyce, being duly sworn, says that he is the general freight agent of The Pennsylvania Railroad Company, one of the defendants in this proceeding, and that the foregoing answer is true, as he verily believes.

(Signed) WILLIAM H. JOYCE.

Sworn and subscribed before me, the sixth day of January, A. D. 1890.

(Signed) AL. P. BURCHELL,
Notary Public.

33 EXHIBIT 3.

Order.

34 At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of February, A. D. 1890.

Present: Hon. William R. Morrison, Hon. Walter L. Bragg, Hon. Wheelock G. Veazey, commissioners.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY, AND THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY.

It appearing to the commission on reading the petition and answer on file in this proceeding, that carriers, other than those named as defendants in said petition, are necessary and proper parties defendant herein, and it further appearing to the commission that subdivision (*c*) of the third paragraph in said answer contains an averment or allegation in regard to the rates charged by said other carriers for inland transportation of import traffic—

It is ordered, that the following-named carriers, to wit:

The New York Central and Hudson River Railroad Company,

The Michigan Central Railroad Company,
The Lake Shore and Michigan Southern Railway Company,
The Chicago and Grand Trunk Railway Company,
The Great Western Railway Company of Canada,
The New York, Lake Erie and Western Railroad Company,
The Chicago and Atlantic Railway Company,
35 & 36 The New York, Pennsylvania and Ohio Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The West Shore Railroad Company,
The Delaware, Lackawanna and Western Railroad Company,
The Grand Trunk Railway Company of Canada,
The Wabash Railroad Company,
The Baltimore and Ohio Railroad Company,
The Philadelphia and Reading Railroad Company,
The Central Railroad Company of New Jersey,
The Boston and Maine Railroad Company,
The Louisville, New Orleans and Texas Railway Company,
The St. Louis, Iron Mountain and Southern Railway Company,
be and each of them is hereby made parties defendant to this proceeding.

It is further ordered, that copies of the petition and answer on file in this proceeding, and of this order, be sent to each of said new defendants, with notice to satisfy the complaint herein, or answer the charges embraced in said petition and subdivision (*c*) of the third paragraph of said answer within twenty days from the date thereof.

And it is further ordered, that a copy of this order be sent to each of the original parties to this proceeding.

37 EXHIBIT 4.

Answer of New York Central & Hudson River Railroad Company.

38 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, Fort Wayne and Chicago and The Pittsburgh, Cincinnati and St. Louis Railroads.

The Interstate Commerce Commission having, on the 8th day of February, 1890, made an order in the above-entitled proceeding, that The New York Central and Hudson River Railroad Company, and certain other railroad companies named in said order, be made parties defendant, and notified to satisfy the complaint, or answer the charges embraced in the petition, and subdivision (*c*) of the third paragraph of the answer, the New York Central and Hudson River Railroad Company, now answering, says:

That it denies that at the date of the filing of said petition it was

violating, or at any time since has violated the provisions in the act to regulate commerce, in the respects charged in the said petition, and in subdivision (*c*) of the third paragraph of the answer thereto.

And this defendant further says and alleges that since the making of the order by the Interstate Commerce Commission, of March 23rd, 1889, respecting, among other things the rates on imported traffic, this defendant has, in every respect complied with said order.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By NATHAN GUILFORD, *General Traffic Manager.*

FRANK LOOMIS,
General Counsel, N. Y. C. & H. R. R. Co.

39 & 40 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Nathan Guilford, being duly sworn, says that he is the general traffic manager of the New York Central and Hudson River Railroad Company; that the foregoing answer is true of his own knowledge, or as he verily believes.

NATHAN GUILFORD.

Sworn to before me this 20 day of February, 1890.
W. J. VAN ARSELLEY,
Notary Public, N. Y. Co.

41 EXHIBIT 5.

Answer of Lake Shore & Michigan Southern Railway Company.

42 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT Wayne and Chicago and The Pittsburgh, Cincinnati and St. Louis Railroads.

The Interstate Commerce Commission having, on the 8th day of February, 1890, made an order in the above-entitled proceeding, that The Lake Shore & Michigan Southern Railway Company, and certain other railroad companies named in said order, be made parties defendant, and notified to satisfy the complaint, or answer the charges embraced in the petition, and subdivision (*c*) of the 3rd paragraph of the answer, the Lake Shore & Michigan Southern Railway Company now answering, says:

That it denies that at the date of the filing of said petition it was violating, or at any time since has violated the provisions in the act to regulate commerce, in the respects charged in the said petition, and in subdivision (*c*) of the third paragraph of the answer thereto.

And this defendant further says and alleges that since the making of the order by the Interstate Commerce Commission, of March 23rd, 1889, respecting, among other things the rates on imported traffic, this defendant has in every respect, complied with said order.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
By J. T. R. McKAY, *Gen'l Fr't Agent.*

GEO. C. GREENE,
Gen. Counsel L. S. & M. S. R'y Co., Cleveland, O.

43 & 44 STATE OF NEW YORK, }
City and County of New York, } ss:

J. T. R. McKay, being duly sworn, says that he is the general freight agent of the Lake Shore and Michigan Southern Railway Company; that the foregoing answer is true of his own knowledge, or as he verily believes.

J. T. R. McKAY.

Sworn to before me this 24 day of February, 1890.
[SEAL.] H. C. DUVAL,
Notary Public, Kings Co.

Certificate filed in N. Y. county.

45 EXHIBIT 6.

Answer of New York, Pennsylvania & Ohio Railroad Company.

46 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT Wayne and Chicago Railway Company, and The Pittsburgh, Cincinnati and St. Louis Railway Company.

The Interstate Commerce Commission having, on the 8th day of February, 1890, made an order in the above-entitled proceeding, that The New York, Pennsylvania and Ohio Railroad Company, and certain other railroad companies named in said order, be made parties defendant, and notified to satisfy the complaint, or answer the charges embraced in the petition, and subdivision (*c*) of the third paragraph of the answer, the New York, Pennsylvania and Ohio Railroad Company, now answering, says:

That it denies that at the date of the filing of said petition it was violating, or at any time since has violated the provisions in the act to regulate commerce, in the respects charged in the said petition, and in subdivision (*c*) of the third paragraph of the answer thereto.

And this defendant further says and alleges that since the making of the order by the Interstate Commerce Commission, of March 23rd, 1889, respecting, among other things the rates on imported traffic, this defendant has, in every respect complied with said order.

THE NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY,
Lessee, Operating the New York, Pennsylvania and Ohio Railroad,
By G. H. VAILLANT, *Freight-traffic Manager.*

J. A. BUCHANAN,
Attorney for the New York, Lake Erie and Western Railroad Company, Lessee of the New York, Pennsylvania and Ohio Railroad.

47 & 48 STATE OF NEW YORK, } *ss:*
City and County of New York, }

George H. Vaillant being duly sworn, says that he is the freight-traffic manager of the New York Lake Erie and Western Railroad Company, lessee, operating the New York, Pennsylvania and Ohio railroad; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE H. VAILLANT.

Sworn to before me this 27th day of February, 1890.
[SEAL.] GEO. E. GRANT,
Notary Public, N. Y. City & Co.

49 EXHIBIT 7.

Answer of New York, Lake Erie & Western Railroad Company.

50 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT WAYNE AND CHICAGO AND THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANIES.

The Interstate Commerce Commission having, on the 8th day of February, 1890, made an order in the above-entitled proceeding, that The New York, Lake Erie and Western Railroad Company and certain other railroad companies named in said order, be made parties defendant, and notified to satisfy the complaint, or answer the charges embraced in the petition, and subdivision (*c*) of the third paragraph of the answer, the New York, Lake Erie and Western Railroad Company, now answering, says:

That it denies that at the date of the filing of said petition, it was violating, or at any time since has violated, the provisions in the act to regulate commerce, in the respects charged in the said petition, and in subdivision (*c*) of the third paragraph of the answer thereto.

And this defendant further says and alleges that since the making of the order by the Interstate Commerce Commission, of March 23rd, 1889, respecting, among other things, the rates on imported traffic, this defendant has, in every respect complied with said order.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
By GEO. H. VAILLANT, *Freight-traffic Manager.*

J. A. BUCHANAN,
Attorney for the New York, Lake Erie and Western Railroad Company.

51 & 52 STATE OF NEW YORK, }
City and County of New York, } *ss:*

George H. Vaillant being duly sworn, says that he is the freight-traffic manager of the New York, Lake Erie and Western Railroad Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEO. H. VAILLANT.

Sworn to before me, this 27th day of February, 1890.

GEO. E. GRANT,
[SEAL.] *Notary Public, N. Y. City & Co.*

53 EXHIBIT 8.

Answer of West Shore Railroad Company.

54 Interstate Commerce Commission.

NEW YORK BOARD OF TRADE AND TRANSPORTATION }
against
PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FT. WAYNE & CHICAGO AND THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILROADS. }

To the honorable the Interstate Commerce Commission:

The West Shore Railroad Company, has, by an order dated the 4th day of February, 1889, been made a party defendant to this proceeding and been required to satisfy the complaint herein or answer the charges embraced in said petition and subdivision (*c*) of the third paragraph of the answer of the original defendants to the complaint filed in the above-stated case.

While the West Shore railroad is leased to the New York Central

and Hudson River Railroad Company, the West Shore railroad is, nevertheless, operated by its own officials and the management of its traffic under a separate and independent organization than that of the lessee company. It has its own general manager, traffic manager, freight and passenger agents and superintendents.

The West Shore railroad was not at the date of the filing of the petition violating, or at any time since has violated, the provisions of the act to regulate commerce, in the particulars complained of in the petition, nor in the particulars averred and charged in subdivision (*c*) of the 3rd paragraph of the said answer.

It is the practice of the West Shore railroad to charge the full inland rate on all west-bound freight received from foreign
55 & 56 countries by ocean, and the full rate is made by the West Shore railroad by adding the inland tariff rate to the ocean rate, and no arrangement has been made by the West Shore railroad for dividing the through rate on traffic from foreign countries in any other way.

THE WEST SHORE RAILROAD,
By J. W. MUSSON, *General Traffic Manager.*

ASHBEL GREEN,
General Counsel, West Shore R. R.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

James W. Musson, being duly sworn, says that he is the general traffic manager of the West Shore railroad; that the foregoing answer is true to the best of his knowledge information and belief.

J. W. MUSSON.

Sworn to before me this 26th day of February, 1890.

CHARLES W. PIERSON,
Com'r of Deeds, City and Co. of N. Y.

57 EXHIBIT 9.

Answer of Boston & Maine Railroad Company.

58 Interstate Commerce Commission.

NEW YORK BOARD OF TRADE AND TRANSPORTATION }
vs.
THE PENNSYLVANIA RAILROAD and Others. }

The answer of the Boston and Maine Railroad, one of the parties to the above-entitled petition, summoned in by special order of the commission of February 8, 1890.

This defendant, for answer to the complaint in this proceeding, respectfully states:

I. That it has not made or charged, nor does it make or charge, tariff rates which constitute an unjust discrimination in violation

of the "act to regulate commerce," as alleged in the first paragraph of said complaint.

II. That it has not made or given, nor does it make or give, undue and unreasonable preferences to certain parties, to the undue and unreasonable prejudice and disadvantage of certain other parties, as alleged in the second paragraph of said complaint.

III. That it has not violated section 4 of said act as amended, as alleged in the third paragraph of said complaint.

IV. And further answering this defendant says that it makes and has made the same rates and charges for transporting imported goods and property over its line from seaboard points to inland points in the United States, as a part of a continuous carriage from foreign ports to such inland points as for transporting other
59 & 60 goods and property delivered to it at such seaboard points for carriage to such inland points; that the same is shown by the published tariffs of this defendant now on file in the office of this honorable commission, which set forth the only rates and charges at which this defendant transports or has transported any goods or property from said seaboard points to said inland points; and that if any other or different rates or charges have been made, the same is due to mistake or inadvertence and not to any intention on the part of this defendant to violate the provisions of the aforesaid act.

Wherefore this defendant prays that as to it the complaint in this proceeding be dismissed.

BOSTON AND MAINE RAILROAD,
By W. F. BERRY, *Its General Freight Agent.*

RICHARD OLNEY,
SIGOURNEY BUTLER, *Of Counsel.*

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk, } *ss:*

BOSTON, *March* 1, 1890.

William F. Berry, being duly sworn, says that he is the general freight agent of the Boston and Maine Railroad aforesaid and that the foregoing answer is true as he verily believes.

Before me—

SIGOURNEY BUTLER,
Justice of the Peace.

61 EXHIBIT 10.

Answer of New York, Chicago & St. Louis Railroad Company.

62 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION, Plaintiff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY, *et al.*, Defendants.

The separate answer of the New York, Chicago and St. Louis Railroad Company to the petition and subdivision (*c*) of the third paragraph of the answer of the Pennsylvania Railroad Company *et al.*

The New York, Chicago and St. Louis Railroad Company for its answer to the petition of the New York Board of Trade and Transportation and subdivision (*c*) of the third paragraph of the answer filed in the above-entitled proceeding by the Pennsylvania Railroad Company *et al.*, says that it is not advised as to the character of the complainant, nor as to the authority of the parties claiming to proceed in its behalf, and asking that the complainant be held to proof thereof, for answer to so much of said petition and of said subdivision as it is advised it is necessary for it to make answer unto, says:—

First. This defendant admits that it is a railroad corporation engaged as a common carrier in the transportation of property. That its own line of railroad extends from Buffalo, New York, to Chicago, Illinois, but that it has arrangements with other common carriers, having connecting lines, for continuous carriage between New York and Philadelphia and Chicago and other western points, so
63 that its railroad constitutes a part of a through and continuous line of transportation under joint tariffs, but that its railroad, and the railroads of the said other carriers are not under any common control or management.

This defendant further answering says that it has not been and is not guilty of the unjust discriminations or any of them mentioned in said petition, and this defendant says that its share of the through rate for inland transportation of property transported from foreign ports and foreign interior points to Chicago and other western points has been the same as its share of the regular joint tariff rates between New York and Philadelphia and the same western points.

Second. This defendant says that it has not published any tariffs or issued through bills of lading from foreign ports or foreign interior points to Chicago and other western points, although it has recognized joint tariffs published by connecting railroads showing the charges from New York and Philadelphia to such points.

Third. This defendant denies that it has made and given or does make and give any undue or unreasonable preference or advantage to persons, firms, companies, and localities interested in the transportation of imported traffic from the seaboard under through bills of lading or has subjected or does subject persons, companies, firms or corporations in or about New York or Philadelphia, or those localities, to undue or unreasonable prejudice or disadvantage by reason of any higher rate charged to them for like or contemporaneous service under substantially similar circumstances or conditions.

Fourth. This defendant further answering says that it does not know what rates have been accepted upon import traffic by the Pennsylvania Railroad Company, but it denies that it has bid any rate which did not allow this defendant to receive its share
64 of the full inland rate on traffic from the seaboard to interior points, and it denies that it has accepted or accepts a less amount as its proportion for inland carriage of its import traffic than it has charged and received on its inland traffic between the same points.

Wherefore this defendant prays that the petition in this proceeding may be dismissed.

UNITED STATES OF AMERICA, } ss:
State of Ohio, Cuyahoga County, }

G. B. Spriggs, being duly sworn, says that he is the general freight agent of the New York, Chicago & St. Louis Railroad Company, and that the foregoing answer is true as he verily believes.

G. B. SPRIGGS.

Subscribed by the said G. B. Spriggs and sworn to by him before me this first day of March, A. D. 1890.

[SEAL.] F. B. CARPENTER,
Notary Public.

65 EXHIBIT 11.

Answer of Philadelphia & Reading Railroad Company.

66 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION, Complainant,
against
THE PENNSYLVANIA RAILROAD COMPANY and Others, Defendants.

Answer of the Philadelphia and Reading Railroad Company.

The Philadelphia and Reading Railroad Company, for answer to the complaint filed against it and others, says:

1. That the complainant does not show, that it is authorized to

have and maintain this complaint against this defendant; or that said complainant has been damaged or discriminated against by this defendant; that complainant does not show that it has had any dealings or transactions with this defendant.

2. That the said defendant has not been guilty of unjust discriminations or any violations of the said act in respect to the matters set forth in the said complaint.

3. This defendant has not given undue and unreasonable preferences and advantages to persons, firms, companies or corporations engaged in the shipment of merchandise from foreign ports, and it has not subjected the consignees designated in the said complaint to undue and unreasonable prejudice and disadvantage by reason of higher rates charged to them than for like contemporaneous services, under substantially similar conditions and circumstances, were charged to others.

67 & 68 4. This defendant has not charged or received, and is not now charging or receiving a less compensation for transporting property (coming by vessels from foreign ports) from Philadelphia to western points, than it charges and receives for transporting property from Philadelphia to western points, which does not originate at or come from foreign ports, and defendant has no arrangement, for joint rates, with vessels and steamships, for shipping such merchandise.

Wherefore, the defendant prays that the complaint may be dismissed at the cost of complainant.

THE PHILADELPHIA AND READING RAILROAD COMPANY,
[SEAL.] By A. A. McLEOD, *Vice-President.*
Attest: W. R. TAYLOR, *Secretary.*

GEO. R. KAERCHER,
Counsel for the Philadelphia and Reading Railroad Company, 227 So. 4th St. Philadelphia.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *ss:*

B. H. Bail, being duly sworn according to law, deposes and says, that he is the general freight agent of the Philadelphia and Reading Railroad Company, and that the several matters and things in the foregoing answer set forth are true, so far as they are within his own knowledge, and he verily believes the same to be true, so far as his information of the same was derived from others.

B. H. BAIL.

Sworn and subscribed before me this 3rd day of March, 1890.

[SEAL.] JOHN G. LAMB,
Notary Public.

69 EXHIBIT 12.

Answer of St. Louis, Iron Mountain & Southern Railway Company.

70 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
v.
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSburgh, Fort Wayne and Chicago Railway Company, The Pittsburgh, Cincinnati and St. Louis Railway Company, The New York Central and Hudson River Railroad Company, The Michigan Central Railroad Company, The Lake Shore and Michigan Southern Railway Company, The Chicago and Grand Trunk Railway Company, The Great Western Railway Company of Canada, The New York, Lake Erie and Western Railroad Company, The Chicago and Atlantic Railway Company, The New York, Pennsylvania and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The West Shore Railroad Company, The Delaware, Lackawanna and Western Railroad Company, The Grank Trunk Railway Company of Canada, The Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The Philadelphia and Reading Railroad Company, The Central Railroad Company of New Jersey, The Boston and Maine Railroad Company, The Louisville, New Orleans and Texas Railway Company, The St. Louis, Iron Mountain and Southern Railway Company. } No. 248.

Answer of the St. Louis, Iron Mountain & Southern Railway Company.

The St. Louis, Iron Mountain and Southern Railway Company is not informed whether the complainant is a corporation and
71 calls for strict proof, and if complainant is a corporation, respondent calls for a copy of its charter, and furthermore it demurs to so much of the complaint as describes the occupation of the stockholders of said corporation as immaterial and surplusage.

Respondent is a common carrier engaged with connecting lines of railway, and steamship and mail connections in the transportation of property from foreign countries to interior ports of entry on its line and on lines beyond its own. Shipments of such property reach the United States by way of the port of New Orleans, and from that port are brought to respondent's terminus by the Texas and Pacific Railway Company. Together with last company respondent is engaged in transporting other property from New Orleans to points on its own line and also of property consigned to points beyond its own terminus. Respondent is not, like the orig-

inal respondent, engaged in transporting property between New York, Philadelphia and Chicago and other western points, but the interior ports of entry, both on respondent's own line and on lines beyond to which merchandise imported from Europe is carried, are reached by the Pennsylvania railroad and its connections, and also by the Canadian railroads and the Great Lakes operating with their railroad connections, and the rates received by the St. Louis, Iron Mountain and Southern, the Texas and Pacific Railway Company and the ocean line of steamers are influenced and controlled by the two routes just mentioned and also by all the routes between New York and Chicago which are in direct competition with the Pennsylvania railroad and its connections.

The St. Louis, Iron Mountain and Southern Railway Company accepts its proportion of the New Orleans division of through rates made from Europe to the various interior ports of entry on or beyond its line, which divisions may be a constantly varying quantity, but if it were practicable it would insist upon the unvarying domestic inland rates. When the agent of the Texas and
72 Pacific railway in Europe finds that the rates via Montreal or New York are less than the combination of the water rate to New Orleans with the rail rate therefrom to interior ports of entry by the lines he represents, he competes for the trade by accepting an equal rate via New Orleans, and if he receives for the railways a sum which yields them a profit over and above the cost of movement, he has not violated any act of Congress, and your respondent does not believe that in accepting for its share of the division of such rate a sum exceeding the cost of movement it has violated any statute, even if the sum so received by it is less than the rate charged on similar traffic originating in New Orleans.

The respondent further says that any difference in such rates is not an unjust discrimination, for the reason that the circumstances and conditions are substantially dissimilar.

Respondent's opinion is that the Texas and Pacific Railway Company, which is party to the combined rate in question, will be seriously affected by a decision in this case, and therefore should have an opportunity to answer to the complaint and be heard.

JOHN S. BLAIR,
For the St. Louis, Iron Mountain & Southern Railway Co.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Before me a notary public in and for the city and District aforesaid, personally came John S. Blair, who being by me duly sworn saith that he is the attorney for the St. Louis, Iron Mountain and Southern Railway Company, and that the statements in the foregoing answer are true as he is informed and verily believes.

JNO. S. BLAIR.

Sworn and subscribed before me this third day of March, 1890.
Witness my hand and notarial seal.

[SEAL.] MARTIN S. DECKER,
Notary Public.

73 EXHIBIT 13.

Amendment to Answer of St. Louis, Iron Mountain & Southern Railway Company.

74 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE ST. Louis, Iron Mountain & Southern Railway Company, and Others. } No. 248.

Now comes the St. Louis, Iron Mountain & Southern Railway Company, by its attorney, John S. Blair, and prays leave of the commission to amend its answer heretofore filed in this cause by adding the Louisville, New Orleans and Texas Railway Company to the Texas and Pacific Railway Company as a carrier with which it transacts through business, under the same conditions and circumstances that its through business is transacted with the Texas and Pacific Railway Company.

Respectfully submitted.

JNO. S. BLAIR.

75 EXHIBIT 14.

Answer of Central Railroad Company of New Jersey.

76 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION, Complainant,
against
THE PENNSYLVANIA RAILROAD COMPANY and Others, Defendants.

Answer of the Central Railroad Company of New Jersey.

The Central Railroad Company of New Jersey, for answer to the complaint filed against it and others, says:

1. That the complainant does not show it is authorized to have and maintain this complaint against this defendant; or that said complainant has been damaged or discriminated against by this defendant; that complainant does not show that it has had any dealings with this defendant.

2. That the said defendant has not been guilty of unjust discrimination or any violations of the said act in respect to the matters set forth in the said complaint.

3. This defendant has not given undue and unreasonable preferences and advantages to persons, firms, companies or corporations engaged in the shipment of merchandise from foreign ports, and it has not subjected the consignees designated in the said complaint

to undue and unreasonable prejudice and disadvantage by reason of higher rates charged to them than, for like contemporaneous services, under substantially similar conditions and circumstances were charged to others.

77 & 78 4. This defendant has not charged or received, and it is not now charging or receiving a less compensation for transporting property (coming from foreign ports) from New York to western points, than it charges and receives for transporting property from New York to western points, which does not originate at or come from foreign ports, and defendant has no arrangement, for joint rates, with vessels and steamships, for shipping such merchandise.

Wherefore the defendant prays that the complaint may be dismissed at the cost of complainant.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By J. R. MAXWELL, *President.*

Attest:
[SEAL.] SAM'L KNOX, *Secretary.*

ROBERT W. DE FOREST,
Counsel for the Central Railroad Company of New Jersey, 119 *Liberty St., New York.*

79 EXHIBIT 15.

Answer of Louisville, New Orleans & Texas Railway Company.

80 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE & TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY and Others.

The Louisville, New Orleans & Texas Railway Company for answer, according to the rule of the commission herein made the 8th day of February, A. D. 1890, to the matters of the petition and subdivision (*c*) of the third paragraph of the answer of the original defendants, respectfully states:

(1) That it is a railway corporation owning and operating a line of railway between the cities of New Orleans, Louisiana, and Memphis, Tennessee, and thereon is a carrier of freight and passengers.

(2) That respondent has neither knowledge or information as to what rate or rates the original defendants The Pennsylvania R. R. Co., The P. Ft. W. & C. R'y Co. and The P. C. & St. L. R'y Co. bid or accepted as their proportion of through rates on import traffic, or as to how low such are or have been, save only as shown by the pleadings herein. It denies that its inland proportion of the through import rates has at any time varied so far from its local

rates on inland traffic between the same points, as instanced in the petition.

(3) That respondent admits that in order to get a share of such import traffic it accepts such business as the ocean carriers bring it, taking same at the rates contracted for by the
81 ship agents on the other side; such through rate usually being divided equally between the ship and the rail line.

This course is forced upon respondent by competitors, carriers by water, the steamboats on the Mississippi river and its confluents. The Anchor line of steamboats, bonded carriers the same as respondent, ply said river between New Orleans and St. Louis and on many lines of such import traffic bid rates 50 % lower that respondent, and so take such business direct from the ship to Memphis and the points intermediate New Orleans, Cincinnati and St. Louis. That such competition by water carriers not subject to the act to regulate commerce is of controlling force and important in volume and amount is shown by the statements from the exchanges of those cities herewith or to be hereafter filed.

Beside, the Illinois Central R. R. Co. is a competitor with respondent for such business for all leading points from New Orleans, and pursues the same policy as herein admitted as followed by this respondent.

(4) That this method of rate-making on import traffic is necessary in order to secure the business, both because of the competition with carriers by water as above shown, and to enable consumers of such imported articles at inland points to obtain same without payment of tolls and tribute to middle men, jobbers at seaports, etc., putting the articles from foreign fields into the hands of the interior consumer at such rates as will enable same to be moved and used in competition with others.

(5) That indeed neither the letter nor the spirit of the act to regulate commerce interdicts the acceptance by respondent of a lower rate as its proportion of a through import (or for that matter a through export) rate than it charges for like service for inland or local haul, the aggregate import rate being as large or larger
82 than the local or inland rate. And the commission has held said act to regulate commerce to apply to foreign as well as domestic common carriers for a continuous carriage from the United States to adjacent foreign countries, and to rates on commerce or traffic over rail lines between interior points of the United States through seaports thereof to or from foreign countries, requiring rail carriers thereof to publish their proportions of such rates. Respondent states that such through import rates in which it has participated have at all times been as great or greater than its local or inland rates over same inland line to same destination, though it has not at all times exacted on imported articles as its proportion of a through import rate a sum corresponding to its local rate on inland traffic passing over its line to like destination; and this it is advised may rightfully be done without violation of the statute—such import rates not being required to be made upon a mileage basis any more than inland rates.

Wherefore respondent prays that the rule against it herein be dismissed.

THE LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY COMPANY,
By HOLMES CUMMINS, *Attorney.*

STATE OF TENNESSEE, }
County of Shelby. }

E. W. How being duly sworn says that he is the general freight and passenger agent of above-named Louisville, New Orleans & Texas R'y Co., and that the foregoing answer is true as he verily believes.

E. W. HOW.

Subscribed and sworn to before me this 5th day of March, A. D. 1890.

[SEAL.] S. W. OVERTON,
Notary Public.

83 EXHIBIT 16.

Answer of Chicago & Atlantic Railroad Company.

84 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION }
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* }

The separate answer of Volney T. Malott, receiver of the Chicago & Atlantic railway, to the complaint in the above cause and subdivision (*c*) of the third paragraph of the answer of the Pennsylvania Railroad Company *et al.* thereto.

The said Volney T. Malott, receiver, in compliance with the order of this honorable commission, entered in the above cause on the 8th day of February, 1890, requiring the Chicago & Atlantic railway and other railway companies therein named to satisfy the complaint herein or answer the charges embraced in said petition and subdivision (*c*) of the third paragraph of the answer of the principal defendant thereto, for answer to said complaint and subdivision (*c*) of the third paragraph of said answer, says that he was on the 18th day of May, 1889, by order of the circuit court of the United States, for the district of Indiana, the northern district of Illinois and the northern district of Ohio, western division, duly appointed and qualified as receiver of the railroad known as the Chicago & Atlantic railway (formerly operated by the Chicago & Atlantic Railway Company), and extending from Chicago, Illinois, through the States of Indiana and Ohio to Marion, Ohio; and that he has been since his appointment, as such receiver, operating said railway under the orders and direction of the courts in which he was appointed.

Further answering said receiver says, that he is not informed as to the truth of the charges and allegations contained in said complaint against the defendants therein named, but denies
85 & 86 that he as such receiver, was a party to or directly concerned in the several supposed grievances therein referred to.

Said receiver further answering says, that he denies that at the date of the filing of said petition he was, while operating said Chicago & Atlantic railway, as such receiver, violating, or has at any time since violated the provisions in the act to regulate commerce, in the respects charged in said petition and in subdivision (c) of the third paragraph of the answer of the original defendants thereto.

And he further says that he, as such receiver, and his employees, so far as he is advised, have at all times, in operating said Chicago & Atlantic railway, and fixing the rates for interstate traffic, conformed to the true intent and meaning of the provisions of law governing the same, as well as the rules and orders of this honorable commission.

Wherefore he prays to be hence dismissed with his costs, and all proper relief.

VOLNEY T. MALOTT,
Receiver of Chicago & Atlantic R'y.,
By JOHN A. HENRY, *His Att'y.*

BAKER & DANIELS, *Of Counsel.*

STATE OF ILLINOIS, }
County of Cook, } *ss:*

A. S. Crane, being first duly sworn on his oath says that he is the general freight agent for the Chicago & Atlantic railway, Volney T. Malott, receiver, and that the facts stated in the foregoing answer are true, as he verily believes.

A. S. CRANE.

Subscribed and sworn to before me this 13th day of March, 1890.

[SEAL.] HENRY C. WEIFORD,
Notary Public.

87 EXHIBIT 17.

Answer of Wabash Railroad Company.

88 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY *et al.*
} Original Complaint.

THE PENNSYLVANIA RAILROAD COMPANY *et al.*
against
THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company, The Wabash Railroad Company, *et al.*

Answer of the Wabash Railroad Company to the cross-complaint of the Pennsylvania Railroad Company *et al.*

The Wabash Railroad Company for answer to the cross-complaint of the Pennsylvania Railroad Company, the Pittsburgh, Ft. Wayne & Chicago Railroad Company and the Pittsburgh, Cincinnati, St. Louis Railway Company, admits that it has, in some instances, accepted a less amount as its proportion of its import traffic than it has received on its inland traffic between the same points.

But for further answer to said cross-complaint, the said Wabash Railroad Company says, it has not at any time received from any person or persons less compensation for the transportation of property from one State into or through another State than it received from other persons for doing for them a like and contemporaneous service, in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Wherefore, having fully answered, the said Wabash Railroad Company asks to be discharged.

THE WABASH RAILROAD CO.,
By WELLS H. BLODGETT, *Attorney.*

89 & 90 STATE OF MISSOURI, *City of St. Louis,* } *ss:*

S. B. Knight, being duly sworn, says that he is the general freight agent of The Wabash Railroad Company, defendant in this proceeding, and that the foregoing answer is true as he verily believes.

S. B. KNIGHT, *G. F. A.*

Subscribed and sworn to before me, this 13 day of March, A. D. 1890.

[SEAL.]

B. C. WINSTON,
Notary Public, City — St. Louis, Mo.

Commission expires Nov. 1, 1893.

Further answering said receiver says, that he is not informed as to the truth of the charges and allegations contained in said complaint against the defendants therein named, but denies
85 & 86 that he as such receiver, was a party to or directly concerned in the several supposed grievances therein referred to.

Said receiver further answering says, that he denies that at the date of the filing of said petition he was, while operating said Chicago & Atlantic railway, as such receiver, violating, or has at any time since violated the provisions in the act to regulate commerce, in the respects charged in said petition and in subdivision (*c*) of the third paragraph of the answer of the original defendants thereto.

And he further says that he, as such receiver, and his employees, so far as he is advised, have at all times, in operating said Chicago & Atlantic railway, and fixing the rates for interstate traffic, conformed to the true intent and meaning of the provisions of law governing the same, as well as the rules and orders of this honorable commission.

Wherefore he prays to be hence dismissed with his costs, and all proper relief.

VOLNEY T. MALOTT,
Receiver of Chicago & Atlantic R'y.,
By JOHN A. HENRY, *His Att'y.*

BAKER & DANIELS, *Of Counsel.*

STATE OF ILLINOIS, }
County of Cook, } *ss:*

A. S. Crane, being first duly sworn on his oath says that he is the general freight agent for the Chicago & Atlantic railway, Volney T. Malott, receiver, and that the facts stated in the foregoing answer are true, as he verily believes.

A. S. CRANE.

Subscribed and sworn to before me this 13th day of March, 1890.

[SEAL.] HENRY C. WEIFORD,
Notary Public.

87 EXHIBIT 17.

Answer of Wabash Railroad Company.

88 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY *et al.*
} Original Complaint.

THE PENNSYLVANIA RAILROAD COMPANY *et al.*
against
THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company, The Wabash Railroad Company, *et al.*

Answer of the Wabash Railroad Company to the cross-complaint of the Pennsylvania Railroad Company *et al.*

The Wabash Railroad Company for answer to the cross-complaint of the Pennsylvania Railroad Company, the Pittsburgh, Ft. Wayne & Chicago Railroad Company and the Pittsburgh, Cincinnati, St. Louis Railway Company, admits that it has, in some instances, accepted a less amount as its proportion of its import traffic than it has received on its inland traffic between the same points.

But for further answer to said cross-complaint, the said Wabash Railroad Company says, it has not at any time received from any person or persons less compensation for the transportation of property from one State into or through another State than it received from other persons for doing for them a like and contemporaneous service, in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Wherefore, having fully answered, the said Wabash Railroad Company asks to be discharged.

THE WABASH RAILROAD CO.,
By WELLS H. BLODGETT, *Attorney.*

89 & 90 STATE OF MISSOURI, *City of St. Louis,* } *ss:*

S. B. Knight, being duly sworn, says that he is the general freight agent of The Wabash Railroad Company, defendant in this proceeding, and that the foregoing answer is true as he verily believes.

S. B. KNIGHT, *G. F. A.*

Subscribed and sworn to before me, this 13 day of March, A. D. 1890.

[SEAL.] B. C. WINSTON,
Notary Public, City — St. Louis, Mo.

Commission expires Nov. 1, 1893.

91 EXHIBIT 18.

Answer of Chicago & Grand Trunk Railway Company.

92 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
v.
THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY.

The Chicago and Grand Trunk Railway Company answering the complaint in the above-named case, and the charges embraced in subdivision (*c*) of the third paragraph of the answer filed in said case by the Pennsylvania Railroad Company and others says: that it has conformed to the rulings of the Interstate Commerce Commission, and that the tariffs issued in connection with ocean steamers as filed by the Grand Trunk Railway Company of Canada have been and are open and available to all local shippers.

WM. A. DAY,
Counsel for Chicago & Grand Trunk R'y Co.

L. J. Seargeant, being duly sworn, says that he is vice-president of The Chicago and Grand Trunk Railway Company, defendant in this proceeding, and that the foregoing answer is true as he verily believes.

L. J. SEARGEANT.

Subscribed and sworn to before me this 17th day of March, A. D. 1890.

[SEAL.] P. GORMAN,
U. S. Vice Consul General at Montreal, Canada.

93 EXHIBIT 19.

Answer of Grand Trunk Railway Company of Canada.

94 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE GRAND TRUNK RAILWAY OF CANADA, Impleaded with Others.

Answer of the Grand Trunk railway.

The Grand Trunk Railway of Canada answering the complaint in the above-named case, and the charges embraced in subdivision (*c*) of the third paragraph of the answer filed in said case by the Pennsylvania Railroad Company and others says:

The Grand Trunk Railway Company responding to an order of the Interstate Commerce Commission, made a tariff of its full inland

west-bound rates, and added such tariff charges to those of its ocean steamship connections. The result was that for traffic from Europe for the United States via the St. Lawrence route, the company's ocean steamship connections reported that on that basis they could literally obtain none in competition with the lower rates charged via United States ports.

The Grand Trunk Railway of Canada then made a special commodity tariff for its inland charges on certain articles therein named but secured only a small share of the United States business.

During the winter season the ocean steamship traffic of the company is done via Portland, but the Grand Trunk is advised by its ocean S. S. connections that the rates are still not low enough to secure sufficient cargoes of the United States and Canadian traffic, and that the steamers on their outward voyages from Liverpool are compelled to ballast partially with coal.

95 This defendant states that it has conformed to the rulings of the Interstate Commerce Commission, and that the tariffs issued in connection with ocean steamers as filed have been and are open and available to all local shippers from Portland and from Montreal.

This defendant is advised by its ocean steamship connections that the difficulty in obtaining traffic lies exclusively in the severe competition via United States ports, and denies the allegation that the low rates via Philadelphia are necessitated by the action of the ocean steamship connections of the Grand Trunk Railway of Canada.

The distance from Liverpool to Chicago by way of Montreal is about 3,636 miles, the ocean mileage 2,800, and the inland 836. Of this mileage 501 is in Canada.

This defendant further says the traffic referred to in said answer is treated by it as subject to the jurisdiction of the Interstate Commerce Commission, and that it has filed tariffs in pursuance of the rules of the commission. Reference in evidence thereof is made to interstate tariff No. G $\frac{D}{10}$ and G $\frac{F}{4}$ taking effect July 27, 1889, and November 25, 1889, respectively—on file with the commission.

It is admitted that there is a complete and independent water route from Montreal to Chicago by canal, river and lake, and this defendant is advised by its ocean steamship connections that they give consignors the option of shipping by water or by rail from Montreal.

WM. A. DAY,
Counsel for Grand Trunk R'y Co.

DOMINION OF CANADA, }
City of Montreal, } *ss:*

96 L. J. Seargeant, being duly sworn, says that he is the traffic manager of The Grand Trunk Railway Company of Canada,

defendant in this proceeding, and that the foregoing answer is true as he verily believes.

L. J. SEARGEANT.

Subscribed and sworn to before me this 17th day of March, A. D. 1890.

[SEAL.] P. GORMAN,
U. S. Vice-consul General at Montreal, Canada.

97 EXHIBIT 20.

Answer of Delaware, Lackawanna & Western Railroad Company.

98 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT Wayne and Chicago, The Pittsburgh, Cincinnati and St. Louis Railroad, The Delaware, Lackawanna & Western Railroad Company, and Others.

The Delaware, Lackawanna & Western Railroad Company, one of the defendants, begs leave to answer to the complaint filed in the above-stated case:

First. The defendants admit they are common carriers substantially as stated in the first section of the first paragraph of the complaint, and as such are engaged in the transportation of property from New York to Chicago and other western points under an arrangement with other railroad companies for continuous carriage between the points aforesaid.

Second. The defendants do not admit making lower rates of transportation on imported traffic than on that delivered to us by our local shippers to forward to Chicago and other western points.

Third. The defendants have no arrangement or agreement with any line of ocean steamships by which through rates of transportation are made from any foreign port to any inland or interior American point.

Fourth. The defendants charge and receive the full inland tariff rates on all traffic consigned to them regardless of the ocean or steamship rates from any foreign port to the American seaboard.

99 & 100 Wherefore the defendants pray that the complaint in this case be dismissed.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.
B. A. HEGEMAN, *Traffic Manager.*

STATE OF NEW YORK, }
City of New York, } *ss:*

Benjamin A. Hegeman, being duly sworn, says that he is the traffic manager of The Delaware, Lackawanna and Western Railroad

Company, one of the defendants in this proceeding, and that the foregoing answer is true, as he verily believes.

B. A. HEGEMAN.

Sworn and subscribed before me the nineteenth day of March, 1890.

[SEAL.] LUDWIG R. MILLER,
Notary Public, Appointed from Kings County;
Certificate Filed in New York County.

101 EXHIBIT 21.

Answer of Michigan Central Railroad Company.

102 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, Fort Wayne and Chicago, and The Pittsburgh, Cincinnati and St. Louis Railroads.

The Interstate Commerce Commission having, on the 8th day of February, 1890, made an order in the above-entitled proceeding, that the Michigan Central Railroad Company, and certain other railroad companies named in said order, be made parties defendant and notified to satisfy the complaint, or answer the charges embraced in the petition and subdivision (*c*) of the third paragraph of the answer, the Michigan Central Railroad Company, now answering, says:

That it denies that at the date of the filing of said petition it was violating, or at any time since has violated, the provisions in the act to regulate commerce in the respects charged in the said petition and in subdivision (*c*) of the third paragraph of the answer thereto.

And this defendant further says and alleges that since the making of the order by the Interstate Commerce Commission of March 23d, 1889, respecting, among other things, the rates of imported traffic, this defendant has, in every respect, complied with said order.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
By H. B. LEDYARD, *President.*

ASHLEY POND,
Gen'l Counsel M. C. R. R. Co.

103&104 STATE OF MICHIGAN, } *ss:*
County of Wayne, }

Henry B. Ledyard, being duly sworn, says that he is the president of the Michigan Central Railroad Company; that the foregoing answer is true of his own knowledge, or as he verily believes.

Sworn to before me this 27th day of February, A. D. 1890.

GEO. L. NADOLLERT,
Notary Public, Wayne County, Michigan.

105 EXHIBIT 22.

Answer of Baltimore & Ohio Railroad Company.

106 Before the Interstate Commerce Commission.

NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*

Answer of the Baltimore & Ohio Railroad Company.

The Baltimore & Ohio Railroad Company in reference to the matters which it is required to answer by order of the commission passed in this cause on the eighth day of February, 1890, says:

1. That it has heretofore made arrangements and prorating agreements with certain lines of steamships plying between the ports of Great Britain and the port of Baltimore by which merchandise has been carried from ports in Great Britain to points in the United States reached by this defendant's lines, upon through bills of lading and at through rates. That the rates which can be obtained for the carriage of such through business to Chicago and other like competitive points are fixed and limited by the rates made by the ocean lines plying to Montreal, Portland and Boston, in connection with the Canadian lines of railroad, and that it is necessary in order that the steamship lines plying to the port of Baltimore may get any business at all that they should meet the rates made by said competing lines. That the result of this competition has been at times to reduce this defendant's proportion of the through rate from ports in Great Britain to Chicago below this respondent's inland tariff rate from Baltimore to Chicago on business originating in Baltimore.

107 & 108 2. This respondent is advised and therefore avers that the acceptance by it as its proportion of the through rate on the business above mentioned of a sum less than its inland tariff rate violates none of the provisions of the act to regulate commerce.

Wherefore this defendant prays that the complaint herein be dismissed as against it.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By FRANK E. HARRIOTT,
Gen. Ft. & Traffic Man.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

Frank Harriott being duly sworn says that he is the general freight-traffic manager of The Baltimore & Ohio Railroad Company, one of the defendants in the above-entitled proceeding, and that the foregoing answer is true as he verily believes.

FRANK HARRIOTT, *G. F. T. M.*

Sworn to and subscribed before me this 20 day of March 1890.

ROBERT A. THURSBY,
Justice of the Peace of the State of Maryland in and for Baltimore City.

109 EXHIBIT 23.

Petition of Commercial Exchange of Philadelphia.

110 Before the Interstate Commerce Commission.

NEW YORK BOARD OF TRADE AND TRANSPORTATION *et al.*
vs.
PENNSYLVANIA RAILROAD CO. *et al.*

To the honorable the Interstate Commerce Commission:

The petition of the Commercial Exchange of Philadelphia respectfully represents:

That it has been permitted to and has joined as a party plaintiff in the above cause:

That for the purpose of the proper representation of its case on the hearing thereof, it requires the production by the defendant, The Pennsylvania Railroad Company, of all agreements between said railroad company or its subsidiary lines, the Pittsburgh, Fort Wayne, & Chicago Railway Company, and the Pittsburgh Cincinnati & St. Louis Railway Company or either of them on the one part, and other railroad companies of the United States or foreign countries and steamship lines on the other part in reference to the transportation of merchandise imported from foreign countries and transported to points west of the Atlantic seaboard, which were in force on or at any time since the 4th day of April, 1887; and also the books of account of said above-named railroad companies defendant, or a tabular statement taken therefrom, showing the rates at which such imported traffic has been carried on and since April 4th, 1887.

To the end therefore that said papers may be obtained and produced before your honorable commission at the hearing of the above case on 10th June, 1890, your petitioner prays a writ of *subpœna duces tecum* directed to George B. Roberts, president,
111 & 112 Frank Thompson, vice-president, and William H. Joyce, traffic manager of said Pennsylvania Railroad Company.

And your petitioner will ever pray, &c.

THE COMMERCIAL EXCHANGE
OF PHILADELPHIA,
[SEAL.] By WALTER F. HAGAR, *President.*

CITY AND COUNTY OF PHILADELPHIA, *ss:*

Personally appeared before me, Walter F. Hagar, president of the Commercial Exchange of Philadelphia, who being duly sworn according to law deposes and says that the facts set forth in the above

and foregoing petition are true to the best of his knowledge and belief.

Sworn to and subscribed before me this 13 day of May, A. D. 1890.

[SEAL.] C. ROSS SMITH,
Notary Public.

113 EXHIBIT 24.

Order.

114 At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22d day of April, A. D. 1890.

Present: Hon. William R. Morrison, Hon. Augustus Schoonmaker, Hon. Walter L. Bragg, Hon. Wheelock G. Veazey, commissioners.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.*

It being made to appear in this case that the Commercial Exchange of Philadelphia has an interest in the controversy presented by the complaint and the answers thereto, and that its interest is adverse to the rates of which complaint is made, and the said Commercial Exchange of Philadelphia having asked for permission to intervene:

It is now ordered, that permission be granted, and that the said Commercial Exchange of Philadelphia be permitted to appear on the taking of testimony in this cause, and to produce and examine witnesses, and to cross-examine the witnesses that are produced on behalf of the defendants; that notice be served upon it of the taking of any testimony by deposition on behalf of the defendants; that it also have notice of the hearing of the cause and be allowed at the hearing to be heard by counsel or otherwise, or to file argument in support of the case of the complainant, as it may be advised.

115 EXHIBIT 25.

Order.

116 At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of April, A. D. 1890.

Present: Hon. William R. Morrison, Hon. Augustus Schoonmaker, Hon. Walter L. Bragg, Hon. Wheelock G. Veazey, commissioners.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et als.*

The commission having reason to believe that other railroad companies subject to the act to regulate commerce besides those

named as respondents in the above-entitled case carry from ports of entry to points in the United States traffic imported from foreign countries at rates that are lower than their published inland tariff rates in effect at the time and under which like traffic is contemporaneously carried;

And the commission having authority to inquire into the management of the business of all common carriers subject to the provisions of the act to regulate commerce and to be informed as to the manner and method in which the same is conducted:

It is ordered, that inquiry be made into the manner and method in which the common carriers hereinafter named conduct their business in respect to the carriage of traffic imported from foreign countries consigned to interior points on through bills or otherwise, the rates charged and received for such carriage, the rates contemporaneously charged and received for like traffic not imported and not so consigned, and that such investigation be made of the business of the following railroad companies, viz:

117 & 118

The Southern Pacific Company;
The Union Pacific Railway Company;
The Northern Pacific Railroad Company;
The Canadian Pacific Railway Company;
The Texas & Pacific Railway Company;
The Illinois Central Railroad Company;
The Lehigh Valley Railroad Company;

And it is further ordered, that a copy of the complaint in this case be served upon each and every of said railroad companies, and that each of said railroad companies is required to file with this commission within twenty days from the time of such service a verified statement setting forth whether it now carries or at any time since March 23, 1889, it has carried imported traffic, whether on through bills or otherwise, at lower rates than it contemporaneously charged for like traffic not imported or not shipped on through bills, and the reasons for such lower rates if charged.

And it is further ordered, that each and every of the above-named carriers is required to appear upon the hearing and investigation of the above-entitled case at the city of Washington on the 20th day of May, 1890, at the office of the Interstate Commerce Commission at 10 o'clock a. m., to be investigated concerning the manner and method in which its business is conducted in respect to imported traffic and to give evidence and be heard in relation to said business, to the end that such order may be made concerning the same as may be just and lawful.

119 EXHIBIT 26.

Letter and Answer of Canadian Pacific Railway Company.

120 The Canadian Pacific Railway Company.

OFFICE OF THE SECRETARY, MONTREAL, *30th April*, 1890.

Edward A. Moseley, Esq., secretary Interstate Commerce Commission, Washington, D. C.

SIR: I beg to acknowledge the receipt of your communication of 22nd of April in regard to case of The New York Board of Trade and Transportation against The Pennsylvania Railroad Company and others.

I am instructed to say that the Canadian Pacific Railway Company's lines do not extend to any of the Atlantic ports, nor has it any traffic or other agreement with connecting American lines reaching such ports, nor with any Atlantic steamship lines running to such ports in connection with any American railway lines, by which goods imported from foreign countries and destined for inland points in the United States are received at rates lower than those charged on domestic or local freight.

Goods imported from foreign countries landed from vessels at the port of Montreal, and destined for inland points in the United States, are carried by this company and are charged the same rates as are charged on the like goods shipped by the local merchants of this city. The tariffs of this company under which imported and local shipments are carried from this port are numbered and dated as follows, and copies of the same were duly forwarded to the Interstate Commerce Commission as the law provides, namely: Interstate tariff No. 6, effective Montreal, May 10th, 1889, and No. 117 dated May 1st, 1890, the latter superseding No. 102 issued March 15th, 1890. These tariffs apply on import traffic from Euro-
121 pean ports delivered to the Canadian Pacific Railway Co. by ocean vessels on the wharves at Montreal, and they bear the following announcement plainly printed in red ink on their title pages, viz:—"During season of navigation the within rates will govern on local business from Montreal and points west in the direct line."

A duly authorized representative of this company will wait upon the commissioner at Washington on May 20th next as requested.

I am, sir, your obedient servant,

C. DRINKWATER, *Secretary.*

Verified.

GEO. OLDS,
General Traffic Manager.

122 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.*

This defendant for answer to the complaint in this proceeding respectfully states:

1. That the lines of the Canadian Pacific Railway Company do not extend to any of the Atlantic ports, nor has it any traffic or other agreement with connecting American lines reaching such ports, nor with any Atlantic steamship lines running to such ports in connection with any American railway line, by which goods imported from foreign countries and destined for inland points in the United States are received at rates lower than those charged on domestic or local freight.

2. Goods imported from foreign countries landed from vessels at the port of Montreal and destined for inland points in the United States, are carried by this company and are charged the same rates, as are charged on the like goods shipped by the local merchants of the city of Montreal aforesaid. The tariff of this company under which imported and local shipments are carried from the said port of Montreal and which said tariff has been duly filed with this commission, is numbered 117, and dated May 1st, 1890, a copy of which is hereto attached. This tariff applies on import traffic from European ports delivered to the Canadian Pacific Railway Company by ocean vessels on the wharves of Montreal, and it bears the following announcement plainly printed in red ink on its title-page, viz:

"During season of navigation the within rates will govern on local business from Montreal and points west in the direct line."

123 Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE CANADIAN PACIFIC RAILROAD COMPANY,
By E. V. SKINNER, *General Eastern Agent.*

DISTRICT OF COLUMBIA, *City of Washington,* } *ss:*

E. V. Skinner being duly sworn says that he is the general eastern agent of The Canadian Pacific Railroad Company, defendant in this proceeding, and that the foregoing answer is true, as he verily believes.

E. V. SKINNER.

Subscribed and sworn to before me this 10th day of June, A. D. 1890.

[SEAL.]

MARTIN S. DECKER,
Notary Public.

124 Interstate No. 117.

Superseding Interstate No. 102. Issued March 15th, 1890. And all supplements thereto.

Canadian Pacific railway.

From
Montreal
to
Chicago, St. Louis, Cincinnati, Louisville, and other Western States points.

To apply on import traffic from European ports delivered to the Canadian Pacific railway by ocean vessels.

Taking effect May 1st, 1890.

(Written across the face:) During season of navigation the within rates will govern on local business from Montreal and points west in the direct line.

Freight received from steam or sailing ship lines at Montreal, for United States points, will be transported subject to following conditions:

Rates shown in this tariff are subject to the current official classification, with exceptions as noted, and to the rules and regulations of transportation adopted by the Canadian Pacific Railway Company.

125 Rates will include handling from ship's side to cars at Montreal, also railway company's proportion of wharfage.

All heavy freight of 1,000 lbs. or over, per piece or package is exclusive of handling from ship's side to cars.

No less charge will be made on any one consignment than for 100 lbs. at first class, subject to a minimum of 50 cents for each consignment.

ARCHER BAKER,
European Traffic Agent,
7 James St., Liverpool.

J. N. SUTHERLAND,
General Freight Agent, Toronto.

GEO. OLDS,
Gen. Traffic Manager, Montreal.

J. A. HOUSTON,
District Freight Ag't, Ottawa.

JOHN CORBETT,
Foreign Freight Agent,
Montreal.

W. B. BULLING, JR.,
Dist. F't Ag't, Montreal.

G. M. BOSWORTH,
Ass't F't Tf. Mn., Toronto.

From Montreal to—	Classes.						
	1st. Cents per 100 lbs.	2nd. Cents per 100 lbs.	3rd. Cents per 100 lbs.	4th. Cents per 100 lbs.	5th. Cents per 100 lbs.	6th. Cents per 100 lbs.	Spe'l. Cents per 100 lbs.
Buffalo, Black Rock, and Suspension Bridge, N. Y.	44	38	30½	21½	18½	15½	13
Detroit, Mich.	51	45	35	24	20	18	13
Toledo, Ohio	51	45	35	24	20	18	13
Cleveland, Ohio, (via Detroit & D. & C. S. N. Co.)	51	45	35	24	20	18	16
Cincinnati, Ohio	55	49	38	26	22	19	15
Jackson, Mich.	59	52	40	28	24	20	13
Indianapolis, Ind.	60	52	40	28	24	20	15
Battle Creek, Mich	65	57	44	31	26	22	13
Chicago, Ill.	65	57	44	31	26	22	13
Milwaukee, Wis., "all rail"	65	57	44	31	26	22	13
Grand Rapids, Mich	65	57	44	31	26	22	13
South Bend, Ind.	65	57	44	31	26	22	13
Bay City, Mich.	65	57	44	31	26	22	20
East Saginaw, Mich	65	57	44	31	26	22	20
Louisville, Ky.	65	57	44	31	26	22	20
St. Paul, Minneapolis, Duluth, West Duluth, Minn., and intermediate points west of Sault Ste. Marie	74	60	48	38	31	27	25
East St. Louis, Ill.	77	67	52	37	31	26	15
St. Louis, Mo.	77	67	52	37	31	26	15

127 & 128 Bridge toll additional.

West-bound freight in bond cannot be sent by this route. Entry must be made and duty paid at Detroit, Mich.

On interstate traffic, agents must not quote or use a higher rate for a shorter than a longer distance, over the same line in the same direction, the shorter being entirely included within the longer distance.

Above special-column rates will apply only on following commodities in car-loads, minimum 24,000 lbs.

Bleach,	Clay,	Pig-iron, scrap iron, or steel and speigle iron.	Sheet lead,
Blooms,	Earthenware in crates,	Puddled bars,	Whiting,
Billets,	Galvanized iron,	Soda (ash and caustic, bicarb, crystals, silicate),	Window glass, common,
Brick,	Granite and sandstone,	Tin and Canada plate,	Wire rods.
Cement,	Nail rods,	Salt,	

Issued at Montreal, April 21st, 1890.

129 EXHIBIT 27.

Answer of Southern Pacific Company.

130 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.*

The Southern Pacific Company, in compliance with the order of the Interstate Commerce Commission, made in the above-entitled cause—requiring among other railroad corporations not originally made defendants therein, this company "To file a verified statement with the commission, setting forth whether it now carries, or at any time since March 23, 1889, it has carried, imported traffic on through bills or otherwise at lower rates than it contemporaneously charged for like traffic not imported or not shipped on through bills, and the reasons for such lower rates, if charged"—respectfully makes and files the following verified statement:

The Southern Pacific Company is, and since March 23, 1889, has been, a connecting and constituent carrier in through freight lines for the direct and continuous transportation of through freight traffic, under joint through rates from China and Japan and from England and Europe to points and places in the United States, and is participating and has participated in the transportation of freight over such through freight lines and does accept and has accepted its proportion of such joint through rates.

That the proportions of such joint through rates accepted by this company, have been and are, as to some portions of such traffic, less than the rates charged and received by it for the transportation of similar traffic over its railroad lines, not shipped over such through freight lines and under such joint through rates.

131 That these through lines are composed of ocean carriers from China and Japan to San Francisco and connecting railroad lines across the continent to the Atlantic coast and of ocean carriers from England and Europe to New Orleans and connecting railroad lines across the continent to the Pacific coast.

That the reasons of this company for accepting proportions of such through rates, which are less than are charged and received by it for the transportation of like traffic over its railroad lines, not so shipped and carried, are, that the circumstances and conditions of the transportation are substantially so dissimilar that, in the case of the through traffic, this company is without power to obtain and is absolutely unable to obtain a more adequate compensation, or what would otherwise be a just and reasonable compensation, for its services in the transportation; and in the case of like traffic not so shipped and carried, this company has the power and is able to obtain a fair and adequate and reasonable and just compensation for its services in the transportation.

And in further explanation of its reasons, this company states that the through freight, so shipped and carried from China and Japan consists of teas, there grown and marketed and shipped direct to places in the United States, and principally upon the Atlantic coast, and the entire traffic originates in the ports of China and Japan.

That there has been and is great and active competition for the transportation of such freight at the ports of China and Japan between competing and opposing carriers, over various routes.

That these competing and opposing carriers are steamers, passing from the ports of China and Japan through the Suez canal direct to places on the Atlantic seaboard of the United States; and vessels sailing direct from the ports of China and Japan to places on the Atlantic seaboard of the United States; and steamers from
132 the ports of China and Japan to Vancouver, with connecting railroad lines across the continent on British territory; and none of these carriers is subject to the provisions of the act to regulate commerce nor to the supervision, decrees, or orders of this commission.

That such teas as pass over the lines of the Southern Pacific Company on through shipments from China and Japan are brought to San Francisco, and are thence transported across the continent principally to places on the Atlantic coast, and in direct competition with these competing and opposing carriers.

That by reason of such competition the Southern Pacific Company has not been and is not able to obtain what would otherwise be a reasonable and just rate and compensation for its services in the transportation of such teas; but it has not carried and does not carry said teas at a loss, and has always received and does receive for the transportation, something more than the actual cost of movement; and the circumstances and conditions of the transportation of teas in which the traffic originates in the ports of China and Japan are not substantially similar to but are substantially and wholly different from the circumstances and conditions of the transportation of teas, and other commodities of like kind, not shipped on through bills and over such through lines, or not imported and in which the traffic originates at San Francisco.

That the teas so carried by this company on direct through rates from China and Japan are received by it at previously appointed dates, and in very large quantities, so that they can be transported by this company in special unmixed trains; and on this account they can be carried over its railroad lines at less cost to this company than other like traffic not so shipped and received.

This statement particularly specifies and defines the method and circumstances of the transportation of teas because complaints
133 and adverse criticisms have been made by merchants of San Francisco against this direct through transportation and the proportionate rates charged thereon, upon the ground that they constitute undue discrimination against teas and other like traffic carried continuously wholly by rail eastward from San Francisco, the transportation of which originates at the port of San Francisco.

But as to such complaints and criticisms, this company answers: That the through rates from China and Japan in which this company participates, are rates unreasonably and unjustly low, but forced by the competition hereinbefore specified, at the ports of China and Japan, where the traffic originates, and by carriers not subject to the act to regulate commerce; and that rates so forced ought not to be, and cannot be, held, to be the measure of the reasonableness and justness of rates for traffic originating at the port of San Francisco, where this competition does not exist. So active and so great is the controlling force of this competition at the ports of China and Japan, that, notwithstanding the said low through rates, in which this company participates and for which it received its proper proportion, this company and the transcontinental railroad lines of the United States have been able to secure only a comparatively small percentage of the entire traffic, and by far the greater proportion is taken by the competing and opposing carriers not subject to the act to regulate commerce; and any increase in this joint through rate will result in turning over to them the entire through traffic; and if this company and the other transcontinental railroad companies of the United States shall be prohibited from participating in such direct, through transportation by the operation of the orders and judgments of this commission, these competing and opposing ocean and foreign carriers will receive the only benefit and advantage that can follow.

134 In addition to the traffic transported under a direct through rate from China and Japan, and as hereinbefore set forth and explained—this company also participates in joint through rates, over direct through lines, from England and Europe at ports where the traffic originates, by steamships to New Orleans, and thence by rail to the Pacific coast. In so far as this company is advised, no complaint or adverse criticism has ever been made by shippers, merchants, or other persons, against the methods of this traffic or the proportionate rates for the transportation; although the proportions received by this company are in part, and to some extent, less than the rates charged and received by it for the transportation, over its lines, of like traffic which originates at New Orleans. The like commodities, however, the transportation of which originates at New Orleans, are few in number and unimportant in extent.

The reasons of this company for accepting proportions of these through rates, which are less than the rates charged and received by it for the transportation of like traffic over its railroad lines, which originates at New Orleans, are, as in the case of the transportation of teas, shipped and carried directly on through rates from China and Japan, that the circumstances and conditions of the transportation are so substantially dissimilar, that in the case of the direct through traffic from England and Europe, where the traffic originates, this company is without power to obtain and is absolutely unable to obtain what would otherwise be reasonable and just rates, and a more adequate compensation for its services in the transportation; and in the case of the like traffic not so shipped and carried, but which originates at New Orleans, this company has the

power and is able to obtain a reasonable and just rate, and an adequate compensation for its service in the transportation: so that while in the latter case it charges and received no more than a reasonable and a just rate, in the former it is forced to accept less. This substantial difference in the conditions and circumstances of
135 the transportation grows out of the active and controlling competition by sea, which exists at the ports of England and Europe and which does not exist at the port of New Orleans. This competition is to some extent that of steamship lines connecting by rail across the isthmus of Panama, but to a greater extent that of ships, principally foreign, sailing from English and European ports direct to the Pacific coast, generally for a return cargo of wheat and other products of California and the adjoining States and Territories and which are not subject to the provisions of the act to regulate commerce, nor to the orders, judgments and decrees of this commission. This competition is especially active and of great controlling force, for that the principal purpose of the owners of these ships, is to obtain the profitable return cargo; and for the outward voyage all freights are actively sought; and when no more profitable rates can be obtained, these vessels will carry the cheap cargoes of coal, and sometimes go in ballast.

It is the power of this competition which forces these low through rates from England and Europe to the Pacific coast and compels this company to accept what would otherwise be less than a reasonable and just rate for its services in the through transportation.

By these through, joint rates from China and Japan and from England and Europe, the Southern Pacific Company has been able to secure some traffic important in amount and earn something over the actual cost of the transportation, which it could not have secured and earned except by participating as a constituent carrier in the through lines and by accepting a proportionate share of the through rates.

This company is an American railroad corporation, operated wholly within the territory of the United States and the com-
136 modities so transported by it are all intended for the use and consumption and are used and consumed by citizens of the United States; and it is respectfully urged that the act to regulate commerce does not require and does not contemplate that this traffic and the earnings from it should be entirely abandoned to ocean or other carriers of foreign countries.

It is respectfully submitted that when by reason of the competition of carriers by sea the circumstances and conditions of traffic and transportation important in amount, and such that a rate greater than the actual cost of movement, though otherwise unreasonably and unjustly low, must be accepted by this company, which is subject to the provisions of the act to regulate commerce, to secure a share in the traffic and transportation which would otherwise go to carriers by sea or foreign carriers not subject to any of the provisions of the act, but wholly free and unfettered; that these circumstances and conditions are not substantially similar to, but are wholly unlike and substantially dissimilar to, those circumstances

and conditions which attend traffic and transportation not subject to this competition; and that no charge of undue or unreasonable preference, or advantage, or prejudice or disadvantage, or of any violation of the provisions of the act to regulate commerce ought to be or can be predicated upon any difference of rates made under such substantial difference of circumstances and conditions.

Wherefore, the Southern Pacific Company asks that the order and citation served upon it in this cause be dismissed.

J. C. MARTIN,
Attorney for Southern Pacific Company.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

J. C. Stubbs, being duly sworn, deposes and says: That
137 & 138 he is an officer, to wit, third vice-president of the Southern Pacific Company, and that the foregoing statement and answer is true, as he verily believes.

J. C. STUBBS.

Subscribed and sworn to before me this 6th day of May, A. D. 1890.

[SEAL.] E. B. RYAN,
Notary Public.

139 EXHIBIT 28.

Answer of Northern Pacific Railroad Company.

140 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FORT Wayne and Chicago and The Pittsburgh, Cincinnati and St. Louis Railroad.

To the honorable the Interstate Commerce Commission:

The Northern Pacific Railroad Company, in compliance with the order of your honorable board, ordering said company to file with the commission a verified statement setting forth whether it now carries or at any time since March 23, 1889, it has carried imported traffic, whether on through bills or otherwise, at lower rates than it contemporaneously charged for like traffic not imported or not shipped on through bills, and the reasons for such lower rates if charged, respectfully states, that it has never at any time carried imported traffic on through bills or otherwise except imported traffic originating at British and European points and destined to points on the Pacific coast reached by this company's lines via Montreal, Canada; that it has carried a small amount of such traffic coming from said foreign ports which was consigned through Montreal, Canada, via the Canadian Pacific railway to Sault Ste. Marie,

thence via the Minneapolis, St. Paul & Sault Ste. Marie railway to Saint Paul, Minnesota, and thence over the railroad of this company to its place of destination on the Pacific coast; that for such carriage it received less than it demanded or received for other traffic delivered to it at Saint Paul, Minnesota, and transferred over its line to such Pacific coast points. That the reason for transporting such imported traffic at a less rate than domestic traffic is, that such imported
141 traffic originating at such foreign ports can be and is transported by vessel to the Pacific coast points reached by this company's railroad, via Cape Horn at a much lower rate than it can be transported by vessel to any Atlantic seaport and thence shipped to its destination by rail, and that, therefore, this company, in order to compete with vessels plying between British and European and Pacific coast points, via Cape Horn, has been compelled to carry such imported traffic at a less rate from Saint Paul to Pacific coast points reached by its line than it charges for similar domestic traffic; that unless this company is permitted to charge such lower rate it cannot obtain any of the business originating at such foreign ports, but that the same, so far as this company is concerned, will be shipped to its destination via Cape Horn. Said company further states that it has charged a less rate for said imported traffic only to Pacific coast points—that is to say, to points on the Pacific coast reached by the railroad of this company and which can also be reached by vessel, and that it has always refused to charge any lower rate for the transportation of such imported traffic destined to any point on its railroad not reached directly by vessel.

Said company therefore denies that the transportation of said imported traffic over its railroad was or is in any manner a violation of the act to regulate commerce, and prays to be hence dismissed.

Dated May 12th, 1890.

JNO. C. BULLITT, JR.,
Attorney for Northern Pacific Railroad Company, Saint Paul, Minn.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

J. M. Hannaford, being first duly sworn, deposes and says that he is traffic manager of the Northern Pacific Railroad Com-
142 pany, that he has read the foregoing statement and that the same is true of his own knowledge.

J. M. HANNAFORD.

Subscribed and sworn to before me, on this 12th day of May, A. D. 1890.

P. P. STARIN,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

143 EXHIBIT 29.

Amended Answer of Northern Pacific Railroad Company.

144 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
against
THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, Fort Wayne and Chicago and The Pittsburgh, Cincinnati and St. Louis Railroads.

To the honorable the Interstate Commerce Commission:

The Northern Pacific Railroad Company, in compliance with the order of your honorable board, ordering said company to file with the commission a verified statement setting forth whether it now carries or at any time since March 23, 1889, it has carried imported traffic, whether on through bills or otherwise, at lower rates than it contemporaneously charged for like traffic not imported or not shipped on through bills and the reasons for such lower rates if charged, respectfully states, that it has never at any time carried imported traffic on through bills or otherwise to points westward except imported traffic originating at British and European points and destined to points on the Pacific coast reached by this company's lines via Montreal, Canada; that it has carried a small amount of such traffic coming from said foreign ports which was consigned through Montreal, Canada, via the Canadian railway to Sault Ste. Marie, thence via the Minneapolis, St. Paul & Sault Ste. Marie to Saint Paul, Minnesota, and thence over the railroad of this company to its place of destination on the Pacific coast; that for such carriage it received less than it demanded or received for other traffic delivered to it at Saint Paul, Minnesota, and transferred over its line to such Pacific coast points. That the reason for transporting such imported traffic at a less rate than domestic traffic is, that such imported traffic
145 originating at such foreign ports can be and is transported by vessel to the Pacific coast points reached by this company's railroad, via Cape Horn at a much lower rate than it can be transported by vessel to any Atlantic seaport and thence shipped to its destination by rail, and that, therefore, this company, in order to compete with vessels plying between British and European and Pacific coast points, via Cape Horn, has been compelled to carry such imported traffic at a less rate from Saint Paul to Pacific coast points reached by its line than it charges for similar domestic traffic; that unless this company is permitted to charge such lower rates it cannot obtain any of the business originating at such foreign points, but that the same, so far as this company is concerned, will be shipped to its destination via Cape Horn. Said company further states that it has charged a less rate for said imported traffic only to Pacific coast points—that is to say, to points on the Pacific coast

reached by the railroad of this company and which can also be reached by vessel, and that it has always refused to charge any lower rate for the transportation of such imported traffic destined to any point on its railroad not reached directly by vessel.

And the respondent further answering says:

The Northern Pacific Company is, and since March 23, 1889, has been a connecting and constituent carrier in through freight lines for the direct and continuous transportation of through traffic, under joint through rates from Japan to points and places in the United States, and is participating and has participated in the transportation of freight over such through freight lines and does accept and has accepted its proportion of such joint through rates.

That the proportion of such joint through rates accepted by this company, have been and are, as to some portions of such traffic, less than the rates charged and received by it for the transportation of similar traffic over its railroad lines, not shipped over such
146 through freight lines and under such joint through rates.

That these through lines are composed of ocean carriers from Japan to Tacoma, Washington, and connecting railroad lines across the continent to the Atlantic coast.

That the reasons of this company for accepting proportions of such through rates, which are less than are charged and received by it for the transportation of like traffic over its railroad lines, not so shipped and carried, are, that the circumstances and conditions of the transportation are substantially so dissimilar that in the case of the through traffic, this company is without power to obtain and is absolutely unable to obtain a more adequate compensation, or what would otherwise be a just and reasonable compensation for its services in the transportation; and in the case of like traffic not so shipped and carried, this company has the power and is able to obtain a fair and adequate and reasonable and just compensation for its services in the transportation.

And in further explanation of its reasons, this company states that the through freight, so shipped and carried from Japan consists of teas, there grown and marketed and shipped direct to places in the United States, and principally upon the Atlantic coast, and the entire traffic originates in the ports of Japan.

That there has been and is great and active competition for the transportation of such freight at the ports of Japan between competing and opposing carriers, over various routes.

That these competing and opposing carriers are steamers, passing from the ports of China and Japan through the Suez canal direct to places on the Atlantic seaboard of the United States, and vessels sailing direct from the ports of China and Japan to places on the Atlantic seaboard of the United States; and steamers from the ports of China and Japan to Vancouver, with connecting railroad lines across the continent on British territory; and none of these
147 carriers is subject to the provisions of the act to regulate commerce nor to the supervision, decrees, or orders of this commission.

That such teas as pass over the lines of the Northern Pacific Com-

pany on through shipments from Japan are brought to Tacoma, Washington, and are thence transported across the continent principally to places on the Atlantic coast, and in direct competition with these competing and opposing carriers.

That by reason of such competition the Northern Pacific Company has not been and is not able to obtain what would otherwise be a reasonable and just rate and compensation for its service in the transportation of such teas; but it has not carried and does not carry said teas at a loss, and has always received and does receive for the transportation, something more than the actual cost of movement; and the circumstances and conditions of the transportation of teas in which the traffic originates in the ports of Japan are not substantially similar to but are substantially and wholly different from the circumstances and conditions of the transportation of teas, and other commodities, of like kind, not shipped on through bills and over such through lines, or not imported, and in which the traffic originates at Tacoma.

That the teas so carried by this company on direct through rates from Japan are received by it at previously appointed dates, and in very large quantities, so that they can be transported by this company in special unmixed trains; and on this account they can be carried over its railroad lines at less cost to this company than other like traffic not so shipped and received.

Said company therefore denies that the transportation of said imported traffic over its railroad was or is in any manner a violation of the act to regulate commerce, and prays to be hence dismissed.

Dated June 10th, 1890.

GARLAND & MAY,
Attorneys for the Northern Pacific Railroad Company,
Washington, D. C.

148 DISTRICT OF COLUMBIA, *ss:*

J. M. Hannaford, being first duly sworn, deposes and says that he is traffic manager of the Northern Pacific Railroad Company, that he has read the foregoing statement and that the same is true of his own knowledge.

J. M. HANNAFORD.

Subscribed and sworn to before me, on this 10th day of June, A. D. 1890.

JOHN T. MITCHELL,
[SEAL.] *Notary Public.*

149 EXHIBIT 30.

Answer of Lehigh Valley Railroad Company.

150 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE & TRANSPORTATION }
vs.
THE P. R. R. Co. *et als.* }

The commission, under date of April 21, 1890, having ordered that inquiry be made into the manner and method in which certain common carriers named in its order, including the Lehigh Valley R. R. Co., conduct their business in respect to import traffic, and that a verified statement be filed by each of the railroad companies named in said order, the said Lehigh Valley Railroad Co. submits the following statement:

The circumstances and conditions attending the transportation of import traffic are in many respects dissimilar from those attending ordinary inland traffic, but the inland rates charged and collected on import traffic now carried or which, since March 23d, 1889, has been carried over this company's lines, are and have been since that date the same as the rates contemporaneously charged and collected for inland traffic not imported, with the following exceptions: (1) Prior to July 1st, 1889, contracts were in some cases outstanding for a certain through import rate during a fixed period, under which contracts the amount allowed this company in the division of such through rates was less than its regular inland tariff, but since the expiration of such time contracts the proportion allowed this company in estimating a through import rate has been its inland rate. (2) Import rates are usually called for by the importer in advance of making shipments, and it has sometimes happened that after such rate has been fixed upon, steamship rates were unexpect-
151 & 152 edly raised, or errors were discovered in making up the estimate for the through rate for combined foreign, ocean and inland transportation, and such through rate has proved to be less than the sum of the several tariff rates at time of shipment.

JOHN TAYLOR,
General Traffic Manager.

STATE OF PENNSYLVANIA, }
County of Northampton, } *ss:*

John Taylor above named, being duly sworn, says that the matters set forth in the foregoing statement by him subscribed are true to the best of his knowledge, information and belief.

Sworn and subscribed before me this 12th day of May, 1890.

[SEAL.] EDWARD J. MALLOY,
Notary Public.

pany on through shipments from Japan are brought to Tacoma, Washington, and are thence transported across the continent principally to places on the Atlantic coast, and in direct competition with these competing and opposing carriers.

That by reason of such competition the Northern Pacific Company has not been and is not able to obtain what would otherwise be a reasonable and just rate and compensation for its service in the transportation of such teas; but it has not carried and does not carry said teas at a loss, and has always received and does receive for the transportation, something more than the actual cost of movement; and the circumstances and conditions of the transportation of teas in which the traffic originates in the ports of Japan are not substantially similar to but are substantially and wholly different from the circumstances and conditions of the transportation of teas, and other commodities, of like kind, not shipped on through bills and over such through lines, or not imported, and in which the traffic originates at Tacoma.

That the teas so carried by this company on direct through rates from Japan are received by it at previously appointed dates, and in very large quantities, so that they can be transported by this company in special unmixed trains; and on this account they can be carried over its railroad lines at less cost to this company than other like traffic not so shipped and received.

Said company therefore denies that the transportation of said imported traffic over its railroad was or is in any manner a violation of the act to regulate commerce, and prays to be hence dismissed.

Dated June 10th, 1890.

GARLAND & MAY,
Attorneys for the Northern Pacific Railroad Company,
Washington, D. C.

148 DISTRICT OF COLUMBIA, *ss:*

J. M. Hannaford, being first duly sworn, deposes and says that he is traffic manager of the Northern Pacific Railroad Company, that he has read the foregoing statement and that the same is true of his own knowledge.

J. M. HANNAFORD.

Subscribed and sworn to before me, on this 10th day of June, A. D. 1890.

JOHN T. MITCHELL,
[SEAL.] *Notary Public.*

149 EXHIBIT 30.

Answer of Lehigh Valley Railroad Company.

150 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE & TRANSPORTATION
vs.
THE P. R. R. CO. *et als.*

The commission, under date of April 21, 1890, having ordered that inquiry be made into the manner and method in which certain common carriers named in its order, including the Lehigh Valley R. R. Co., conduct their business in respect to import traffic, and that a verified statement be filed by each of the railroad companies named in said order, the said Lehigh Valley Railroad Co. submits the following statement:

The circumstances and conditions attending the transportation of import traffic are in many respects dissimilar from those attending ordinary inland traffic, but the inland rates charged and collected on import traffic now carried or which, since March 23d, 1889, has been carried over this company's lines, are and have been since that date the same as the rates contemporaneously charged and collected for inland traffic not imported, with the following exceptions: (1) Prior to July 1st, 1889, contracts were in some cases outstanding for a certain through import rate during a fixed period, under which contracts the amount allowed this company in the division of such through rates was less than its regular inland tariff, but since the expiration of such time contracts the proportion allowed this company in estimating a through import rate has been its inland rate. (2) Import rates are usually called for by the importer in advance of making shipments, and it has sometimes happened that after such rate has been fixed upon, steamship rates were unexpect-
151 & 152 edly raised, or errors were discovered in making up the estimate for the through rate for combined foreign, ocean and inland transportation, and such through rate has proved to be less than the sum of the several tariff rates at time of shipment.

JOHN TAYLOR,
General Traffic Manager.

STATE OF PENNSYLVANIA, } *ss:*
County of Northampton, }

John Taylor above named, being duly sworn, says that the matters set forth in the foregoing statement by him subscribed are true to the best of his knowledge, information and belief.

Sworn and subscribed before me this 12th day of May, 1890.

[SEAL.] EDWARD J. MALLOY,
Notary Public.

153 EXHIBIT 31.

Answer of Union Pacific Railway Company.

154 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.*

The Union Pacific Railway Company, in compliance with the order of the Interstate Commerce Commission in the above-entitled case made April 21st, 1890, makes answer to complaint served upon it as follows, viz:

That it is engaged in import traffic between Asiatic ports and points in the United States by way of the port of San Francisco, also between European ports and points in the United States by way of New Orleans, both by way of its route via Fort Worth, Texas, and by lines connecting with its road at Kansas City, Missouri.

That it has been engaged in such traffic both before and since March 23rd, 1889.

That its proportion of the through rates upon which such traffic is transported is in many cases less than the rates charged and received by it for the transportation of similar traffic upon its own lines between the same points.

That this company's lines are intermediate lines engaged in the transportation of this traffic and for any particular reference to the methods of conducting the same it refers you to the lines directly handling same.

That those lines are, on Asiatic business via the port of San Francisco and Southern Pacific Company, on European business via New Orleans and Fort Worth, the Southern Pacific Company and the Houston & Texas Central railroad, via New Orleans and Kansas City, the Louisville, New Orleans and Texas railroad and the Kansas City, Fort Scott and Memphis railway.

155 This respondent respectfully submits—

That the circumstances and conditions under which the traffic referred to in this complaint and answer is transported are substantially dissimilar to those under which the same business would be transported locally between the same points.

That its charges locally are to be considered in the light of whether they are reasonable or not.

That in engaging in the particular traffic that is the subject of this complaint the only thing to be considered is whether the same is a burden to the company to such an extent as to require undue charges upon its other traffic as an offset.

That the lines transporting the traffic in question and of which the line of this company is only a part are unable to obtain any greater compensation than is charged on account of the compensa-

tion of other carriers who are not subject to the provisions of the act to regulate commerce, and if we are not allowed to continue to handle this traffic substantially as at present it will be wholly diverted to lines of transportation beyond the control of this country and cause this company serious loss.

That while the proportion of the through rates is lower on this traffic than is charged upon the same traffic transported locally between same stations in this country, in the aggregate there is a margin of profit to be obtained from engaging in the same and it is valuable to just the extent of that margin.

That so long as its rates between points upon its own lines are not unreasonable for the carriage of this class of traffic as it is enabled to secure at a considerably less rate in connection with other lines when the revenue thus secured is diverted from lines of transportation wholly or in part removed from the jurisdiction of this commission and from the restrictions of the act to regulate
156 commerce and when the revenue thus earned enables it to more cheaply do the other business tributary to its lines.

That in its judgment no charge or undue or unreasonable preference, prejudice, disadvantage or any violation of the provisions of the act to regulate commerce can be sustained against it on account of any difference in rates charged locally between points upon its lines as compared with the proportionate part of the through rate it receives upon its import traffic the circumstances and conditions under which the same are handled by it being so dissimilar in character.

JOHN S. BLAIR, *Attorney.*

UNITED STATES OF AMERICA, } ss:
State of Nebraska, Douglas County, }

C. S. Mellen, being first duly sworn, deposes and says that he has read the foregoing answer and believes the facts therein stated to be true.

C. S. MELLEN,
General Traffic Manager.

Sworn to before me and signed in my presence this 13th day of May, 1890.

W. WHITTAKER,
Notary Public.

157 EXHIBIT 32.

Answer of Illinois Central Railroad Company.

158 Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION }
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* }

The Interstate Commerce Commission having on the 21st day of April, 1890, made an order in the above-entitled proceeding, that a

copy of the complaint be served on the Illinois Central Railroad Company and certain other railroad companies named in said order, and that each of said railroad companies be required to file with the commission "a verified statement setting forth whether it now carries or at any time since March 23rd, 1889, it has carried imported traffic, whether on through bills or otherwise, at lower rates than it contemporaneously charged for like traffic not imported or not shipped on through bills, and the reasons for such lower rates if charged;" the Illinois Central Railroad Company now answering says:

That on all imported traffic which was not shipped on through bills of lading from a foreign port to interior points, the full inland rates were charged.

On imported traffic forwarded from point of export to interior points on through bills of lading, joint through rates have been made with the steamship companies and filed with the commission. The proportion of these through rates accruing to this company have not in all cases been as great as the rates for traffic not imported. The through rates upon which the imported traffic was moved were in no case less than the inland rates. From the best advice that this company could receive on the subject, it was not thought that the commission by its ruling of March 23rd, 1889,
159 & 160 contemplated that the inland proportion of a through rate from a foreign country to an interior point must necessarily be the same as the local inland rate. Any other view of the case would have obliged the Illinois Central Railroad Company to have relinquished the traffic, for competing rail carriers had tariffs in effect on this basis and controlled the traffic prior to the establishment of through rates by this company. (See copies of correspondence attached.)

Since March 18th, 1890, the Illinois Central Railroad Company has not taken for shipment any import traffic, for the reason that to meet the action of competing lines it would be necessary to make the through rates from foreign ports to interior points less than the local inland rates, and not feeling justified in doing this, it has to its great detriment refrained from engaging in the business.

All of which is respectfully submitted.

ILLINOIS CENTRAL RAILROAD COMPANY,
By T. J. HUDSON, *Traffic Manager.*

STATE OF ILLINOIS, }
County of Cook. }

Being duly sworn says that he is the traffic manager of the Illinois Central Railroad Company and believes the foregoing statement to be true and correct to the best of his information, knowledge and belief.

[SEAL.]

F. W. WOOD,
Notary Public.

161 EXHIBIT 33.

Answer of Texas & Pacific Railway Company.

162 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION
vs.
THE PENNSYLVANIA RAILROAD COMPANY and Others. } No. 248.

Statement of the Texas & Pacific Railway Company.

The Texas and Pacific Railway Company acknowledges service of the complaint in the foregoing case, and of the order of the commission made therein on the 21st of April, 1890, and in compliance with said order herewith files its statement.

Both before and since March 23, 1889, it has carried imported traffic at lower rates than it has contemporaneously charged for like traffic originating in the United States, and it does so because the through shipment from a foreign country to the interior of the United States differs in circumstances and conditions from shipments originating at the American seaboard bound for the same interior points, and it believes that it has a legal right to accept for its share of the through rate a lower sum than it receives for domestic shipment to the same destination from the point at which the imported traffic enters the country.

The Texas and Pacific Railway Company has for one of its termini the city of New Orleans, the commercial gateway of the gulf of Mexico. The position of this port with reference to the Atlantic ports, the isthmus of Panama and the Mississippi valley renders the importation trade of great importance to the respondent. The extent of the area to which it, by means of its rail connections, distributes the imports, is shown in the following tariff sheets, already on file with the commission:

163 (1.) Foreign freight tariff No. 36, in connection with the Harrison steamship line and the Denver, Texas and Fort Worth Railroad Company, and the Union Pacific Railway Company, on earthenware and crockery, from London, England, to Silver Bow, Butte, Anaconda, Garrison and Helena, Montana.

(2.) Foreign freight tariff No. 17, in connection with the Ross line of steamers and the Fort Worth and Denver City Railway Company, and the Denver, Texas and Fort Worth Railroad Company, from London, England, to Denver, Colorado Springs, Pueblo, El Moro and Trinidad, Colorado, and intermediate points.

(3.) Foreign freight tariff No. 20, in connection with the Harrison steamship line and the Fort Worth and Denver City Railway Company, and the Denver, Texas and Fort Worth Railroad Company, from London, England, to Denver, Colorado Springs, Pueblo, El Moro, and Trinidad, Colorado, and intermediate points, and applying on the articles named therein.

(4.) Foreign freight tariff No. 24, in connection with the Harrison steamship line, the Fort Worth and Denver City Railway Company, the Denver, Texas and Fort Worth Railroad Company, and the Union Pacific Railway Company, from Liverpool, England, to Colorado common points and Portland, Oregon, applying on earthenware and crockery.

(5.) Foreign freight tariff No. 25, in connection with the French Commercial steamship line, from Havre and Bordeaux, France, Antwerp, Belgium, and Hamburg, Germany, via New Orleans, to Los Angeles, Stockton, San José, Sacramento, Marysville, Oakland and San Francisco, California, applying on the articles
164 named therein. Reference is also made to Supplement No. 1 to said foreign freight tariff No. 25, which is also on file with the commission.

(6.) Foreign freight tariff No. 27, in connection with the Missouri Pacific Railway Company and certain steamship lines, from Swansea, Wales, to Memphis, St. Louis and the Missouri River points, and applying on tin plate, in car-loads.

(7.) Foreign freight tariff No. 32 (D., T. & F. W., No. D-372-A), in connection with the Ross line of steamers, and the Denver, Texas and Fort Worth Railroad Company and connections, from London, England, and from Hamburg, Bremen, and Antwerp, to Portland, Tacoma, Seattle, Port Townsend, Victoria, Vancouver, and New Westminster, and applying on the articles therein named.

(8.) Foreign freight tariff No. 33 (D., T. & F. W., No. D-373-A), in connection with the French Commercial steamship line and the Denver, Texas and Fort Worth Railroad Company and connections, from Havre, and Bordeaux, France, and Antwerp and Hamburg, Germany, to Portland, Tacoma, Seattle, Port Townsend, Victoria, Vancouver, and New Westminster, and applying on the articles therein named.

(9.) Foreign freight tariff No. 34 (D., T. & F. W., No. D-374-A), in connection with the Harrison steamship line and the Denver, Texas and Fort Worth Railroad Company and connections, from Liverpool, England, to Portland, Tacoma, Seattle, Port Townsend, Victoria, Vancouver, and New Westminster, applying on the articles therein named.

(10.) Foreign freight tariff No. 35, in connection with the Harrison steamship line and the Southern Pacific Company (Pacific system) from Liverpool, England, to certain points in the interior of the United States, and San Francisco and Oakland, applying on the articles therein named.

165 The controlling forces which make the rates named in said sheets are the water line from Europe around Cape Horn to the Pacific coast, the water line directly to the Mexican seaports, the water line via the isthmus of Panama to the Pacific coast, the water line to the Atlantic seaboard together with the rail lines into the interior, the water lines to the ports of New England which connect by a through rail connection with the Canadian roads, and thence via United States lines to the interior, the water line to Montreal or Quebec, thence by the Great Lakes to Chicago or Duluth and thence

by rail to the interior, the water line to Quebec, thence by the Canadian Pacific to the ports of entry on the Canadian border, and the water line via New Orleans and the Mississippi river to St. Louis, and other points reached by inland carriers.

Should respondents be compelled to increase its share of the inland rate to the rate that is charged for interior shipments the community at New Orleans would not be benefited, for the communities in the interior reached by respondent and its connections would have their roads supplied via the Canadian lines, and then on the Pacific coast by the all-water lines, and respondent would be compelled to surrender its import business.

Respondent avers that the domestic rates are fair and reasonable in themselves, and that the share received by it of the rates in imported traffic is fair and reasonable, in view of the controlling force of the circumstances under which the freight is obtained, and that the circumstances controlling both shipments are so dissimilar as to prevent any comparison between the two.

TEXAS AND PACIFIC RAILWAY COMPANY,
By JNO. S. BLAIR, *Attorney.*

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

166 Before me, a notary public in and for the District and city aforesaid, personally appeared John S. Blair, who being duly sworn, says that he is attorney for the Texas and Pacific Railway Company, and that the foregoing statement is just and true as he verily believes.

JNO. S. BLAIR.

Sworn and subscribed before me this 29th day of May, 1890.

MARTIN S. DECKER,
[SEAL.] *Notary Public.*

167 & 168 EXHIBIT 34.

Report and Opinion of the Commission.

169 Before the Interstate Commerce Commission.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION, The Commercial Exchange of Philadelphia, and The San Francisco Chamber of Commerce

v.

THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, Ft. Wayne and Chicago Railway Company, The Pittsburgh, Cincinnati and St. Louis Railway Company, The New York Central and Hudson River Railroad Company, The Michigan Central Railroad Company, The Lake Shore and Michigan Southern Railway Company, The Chicago and Grand Trunk Railway Company, The New York, Lake Erie and Western Railroad Company, The Chicago and Atlantic Railway Company, The New York, Pennsylvania and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The West Shore Railroad Company, The Delaware, Lackawanna and Western Railroad Company, The Grand Trunk Railway Company of Canada, The Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The Philadelphia and Reading Railroad Company, The Central Railroad Company of New Jersey, The Boston and Maine Railroad Company, The Louisville, New Orleans and Texas Railway Company, The St. Louis, Iron Mountain and Southern Railway Company, The Southern Pacific Company, The Union Pacific Railway Company, The Northern Pacific Railroad Company, The Canadian Pacific Railway Company, The Texas and Pacific Railway Company, The Illinois Central Railroad Company, The Lehigh Valley Railroad Company.

Complaint filed December 3, 1889.—Joint answer of original defendants filed January 9, 1890.—Additional parties defendant added February 8, 1890.—Answers of new defendants filed February 24–March 21, 1890.—Other carriers cited in and ordered to file verified statements April 21, 1890.—Leave to intervene in behalf of complainant granted to the Commercial Exchange of Philadelphia April 22, 1890.—Appearance of San Francisco Chamber of Commerce on behalf of complainant entered June 10, 1890. Hearings had June 10, 11 and 17, 1890.—Briefs filed August 7 to October 16, 1890.—Decided January 29, 1891.

1. The act to regulate commerce specifically provides for the regulation of the transportation of foreign merchandise when brought from a foreign port of shipment to a port of entry of the United States and transported from such port of entry to a place within the United States upon a through bill of lading,

or when transported from a foreign port to a port of entry of a foreign country adjacent to the United States and transported from such port of entry to a place of destination within the United States upon a through bill of lading.

2. The regulation thus provided is such as regulates the rates, charges, facilities afforded and treatment of the foreign merchandise from the port of entry in either instance, as the case may be, to the place of destination of the merchandise within the United States, but it is not a regulation that extends to the control of rates made upon such foreign merchandise in the foreign port of shipment for its carriage to the port of entry of the United States or to the port of entry in a foreign country adjacent to the United States.

3. With respect to that part of the carriage of such foreign merchandise between the ports of entry and the place of destination in the United States, the rule of the statute is that it is entitled to no preference in rates, charges, facilities afforded and treatment over domestic merchandise or other merchandise when these are a like kind of traffic transported from such ports of entry to such places of destination, but as to that service stands upon the same basis of equality with domestic merchandise or other freight as to rates, charges, facilities afforded and treatment, and must be carried upon this part of its journey under the inland tariffs of the carriers established for the transportation of domestic merchandise or other freights, and under the same rules governing their carriage, as to weight, bulk, value, expenses of carriage and all such other circumstances and conditions as enter into the making of just
170 and reasonable rates and of avoiding unlawful prejudice and unjust discriminations, such as is provided by the statute.

4. The circumstances and conditions surrounding the making of the rates upon such foreign merchandise in the foreign port of shipment have had their weight and operation in its foreign carriage to the port of entry and in the charges made and facilities afforded for that service, but after such foreign merchandise has been brought within the United States on its way to destination in the United States it encounters other circumstances and conditions that are controlling in this part of its carriage, namely, the laws of the United States made for the regulation of its rates and carriage.

5. The publication of such inland joint tariffs for the transportation of such foreign merchandise under the statute and of advances and reductions should be made at the port of entry and also at the point of destination of freight in the United States by posting the same in a public place at the depot of the carrier where the freight is received in the port of entry and where it is delivered at the place of destination in the United States.

6. The term "a like kind of traffic," as it occurs in section 2 of the act to regulate commerce, and as used in this report and opinion, does not mean traffic that is identical, but it means

traffic that is of "a like kind," with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference.

7. Commodity class rates described and discussed.
8. The power of interstate carriers to make commodity class rates and special class rates to meet the circumstances and conditions of traffic along their lines recognized and defined.

John D. Kernan for New York Board of Trade and Transportation.

Read & Pettit for Commercial Exchange of Philadelphia.

S. W. Sears for San Francisco Chamber of Commerce.

James A. Logan and Wayne MacVeagh for Penn. R. R. Co.

James A. Logan and A. H. Wintersteen for Pittsburgh, Ft. Wayne & Chicago R'y Co. and Pittsburgh, Cincinnati & St. Louis R'y Co.

Frank Loomis for N. Y. C. & H. R. R. R. Co.

Ashley Pond for Mich. Cent. R. R. Co.

G. C. Greene for L. S. & M. S. R'y Co.

W. A. Day for Grand Trunk R'y Co. of Canada and C. & G. T. R'y Co.

J. A. Buchanan for N. Y., L. E. & W. R. R. Co. and N. Y., P. & O. R. R. Co.

Baker & Daniels and John P. Henry for receiver of Chicago & Atlantic R'y Co.

S. E. Williamson for N. Y. C. & St. Louis R'y Co.

Ashbel Green for West Shore R. R. Co.

W. H. Blodgett for Wabash R. R. Co.

John K. Cowen and Hugh L. Bond, Jr., for B. & O. R. R. Co.

G. R. Kaercher for P. & R. R. R. Co.

R. W. de Forest for Cent. R. R. Co. of New Jersey.

Sigourney Butler for B. & M. R. R. Co.

Holmes Cummins for L., N. O. & T. P. R'y Co.

J. M. Wilson for Union Pacific R'y Co.

John S. Blair for St. L., I. M. & S. R'y Co., Union Pacific R'y Co. and Texas & Pacific R'y Co.

C. H. Tweed and J. C. Martin for Southern Pacific Co.

Garland & May and J. C. Bullitt, Jr., for Northern Pacific R. R. Co.

A. C. Raymond for Canadian Pacific R'y Co.

F. I. Gowen for Lehigh Valley R. R. Co.

Report and Opinion of the Commission.

BRAGG, *Commissioner:*

The complaint in this case was originally filed by the New York Board of Trade and Transportation against the Pennsylvania Railroad Company, the Pittsburgh, Fort Wayne and Chicago Railway Company and the Pittsburgh, Cincinnati and St. Louis Railway Company. Subsequently by intervention the Commercial Exchange

of Philadelphia and the San Francisco Chamber of Commerce became parties complainant also, and in consequence of facts set up in the answers of the defendants it was found necessary to make quite a number of other carriers defendant, as will be hereinafter explained.

The complaint charges in substance that the defendants, being common carriers engaged in the transportation of property between New York, Philadelphia and Chicago and other western points, have, since April 4, 1887, in violation of the act to regulate commerce, been and are guilty of unjust discriminations in that they have been and are in the habit of charging the regular tariff rates upon property when delivered to them at New York and
171 Philadelphia for transportation to Chicago and other western points, while charging other persons rates which are lower and even fifty per cent. thereof for a like and contemporaneous service under substantially similar circumstances and conditions when the property was or is delivered to them at New York or Philadelphia by vessel and steamship lines under through bills of lading from foreign ports and foreign interior points issued under an arrangement between the defendants and such vessels and steamship lines and foreign railroads for the continuous carriage at joint rates from the point or port of shipment to Chicago and other western points, the defendants' share of such through rate being, as aforesaid, lower than their regular tariff rates.

As an illustration of this there is a table in the complaint showing alleged rates on shipments from Dumferline, Scotland, to Chicago, Illinois, and from Liverpool, England, to Chicago, Illinois, as follows:

Rates Charged per 100 lbs., etc., in Cases Where Imports were Carried by the American Line to Philadelphia.

Date—bill.	Points.	Goods.	Through rate.	Rail and ocean to Phila.	Inland, Phila. to Chicago.	Tariff, Phila. to Chicago.
1888.						
June 25	Dumferline, Scotland, to Chicago.	Linens.....	76.40 cts.	44.50 cts.....	31.90 cts.....	69 cts.
1889.						
March 4	Dumferline, Scotland, to Chicago.	"	88 "	42 "	46 "	" "
July 1	Dumferline, Scotland, to Chicago.	"	80 "	40.91 "	39.09 "	" "
June 25	Liverpool to Chicago.....	Anvils.....	29.47 "	8.42 "	21.05 "	33 "
Feb. 27	" "	"	26.79 "	8.42 "	18.37 "	" "
April 15	" "	Tin plate..	24 "	8 "	16 "	28 "
June 17	" "	Tin plate, c. l..				

That by said alleged discriminations the defendants have made and given and do make and give undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities interested in the transportation of imported traffic from the seaboard under such through bills of lading, and have subjected and do subject persons, companies, firms and cor-

porations in and about New York and Philadelphia and those localities to undue and unreasonable prejudice and disadvantage.

That the charge as aforesaid, the lower rate on imported traffic than the regular tariff rates, constitutes a violation of section four of the act to regulate commerce as amended, in that the defendants thereby have charged and received and do charge and receive a greater compensation for the transportation from the seaboard to interior points than under such through bills of lading they receive upon imported traffic carried to more distant interior points.

That in order to prevent the ascertainment of the actual inland rates, the defendants have failed and do fail to state in their published tariffs or in such bills of lading the inland charge separately from the ocean and other charges. That the Pennsylvania Railroad Company is an owner of or interested in the management and operation of the steamship line running from New York and Philadelphia to foreign ports, and under the opportunity thus afforded it of fixing their through rates from the foreign ports and points it is enabled to and does practice the unjust discriminations complained of in connection with the other defendants in such a way as to make full ascertainment of the facts involved very difficult. And in connection with this last averment complainant prays that the commission may cause a full discovery of said through rates to be made.

Full relief and all such orders and proceedings as may be necessary to prevent the continuance of the alleged violations of law are prayed for.

The defendants, The Pennsylvania Railroad Company, The Pittsburgh, Fort Wayne & Chicago Railway Company and The Pittsburgh, Cincinnati & St. Louis Railway Company filed a joint and several answer, in which they deny that they are guilty of unjust discrimination, or have violated section four of the act to regulate commerce as amended, according to its true spirit and purpose, or that either of them is interested in the management and operation of the steamship lines running from New York and Philadelphia to foreign ports.

That the Pennsylvania Railroad Company owns capital stock and bonded indebtedness of the International Navigation Company to the extent of less than one-sixth of the aggregate of such stock and indebtedness, but takes no part in, and does not assume, the control or supervision of the ships of said International Navigation Company, and does not claim or exercise any exceptional facilities with reference thereto by reason of its said stock and bond ownership.

They admit that it had been their practice for a considerable period prior to October 1st, 1889, to charge less than their inland tariff rates upon import traffic under through bills of lading issued at foreign points to Chicago and other western points via New York and Philadelphia, but not as much less as is stated in the
172 statement on page 3 of the complaint. They further allege that the arrangement between them and certain steamship lines, under which this practice prevailed, expired on the first day

of October, 1889. They aver, however, that they are advised that said practice was necessary and may be justified.

First. The principle that a less sum may be received for a continuous passage over several lines than the sum of the local rates of all the parties to the carriage, had equal application whether all the lines forming such through route be within the limits of the United States, or whether a portion of that route, or some parties to the carriage, be beyond those limits.

Second. In competition with the route of defendants and said steamship lines from foreign points to Chicago there existed and exists a route via Montreal which has a complete and independent water as well as rail route from Montreal to Chicago, both of which are open to shippers by said competing line, and the reductions in the through rate, which resulted in bringing the inland rate accepted by the defendants below their regular tariff rate, have been rendered necessary in order to enable them to obtain traffic via New York and Philadelphia, as against the competition of said Montreal line.

Third. As showing that the water and Canadian competition referred to affected other carriers as it did defendants, said defendants aver that the competing lines of railroad from the seaboard to interior points have constantly through the agents of the connecting water lines to Europe bid as low and sometimes lower rates on the same character of freight than those accepted by defendants; and on information and belief defendants charge that said lines accepted and accept a less amount as their proportion for the inland carriage for import traffic than they charge and receive on inland traffic between the same points.

It appearing from the complaint and answer of defendants that carriers other than those named in the complaint were necessary and proper parties defendant, the commission, by order of February 8, 1890, made the following carriers parties defendant, directing that they be notified to satisfy the complaint or answer the charges embraced in the complaint, and of that portion of the answer of the defendants which referred to their practices in this behalf, within twenty days from said date:

The New York Central and Hudson River Railroad Company,
The Michigan Central Railroad Company,
The Lake Shore and Michigan Southern Railway Company,
The Chicago and Grand Trunk Railway Company,
The Great Western Railway Company of Canada,
The New York, Lake Erie and Western Railroad Company,
The Chicago and Atlantic Railway Company,
The New York, Pennsylvania and Ohio Railroad Company,
The New York, Chicago and St. Louis Railroad Company.
The West Shore Railroad Company,
The Delaware, Lackawanna and Western Railroad Company,
The Grand Trunk Railway Company of Canada,
The Wabash Railroad Company,
The Baltimore and Ohio Railroad Company,
The Philadelphia and Reading Railroad Company,

The Central Railroad Company of New Jersey,
The Boston and Maine Railroad Company,
The Louisville, New Orleans and Texas Railway Company,
The St. Louis, Iron Mountain and Southern Railway Company.

By a further order in this case of date April 21, 1890, the following additional railroads were made parties defendant and each required to file with the commission a verified statement setting forth whether it now carries, or at any time since the date of an order made by the commission of March 23, 1889, has carried, imported traffic, whether on a through bill or otherwise, at lower rates than it contemporaneously charged for the like traffic not imported or not shipped on through bills, and the reasons for such lower rates, if charged:

The Southern Pacific Company,
The Union Pacific Railway Company,
The Northern Pacific Railroad Company,
The Canadian Pacific Railway Company,
The Texas & Pacific Railway Company,
The Illinois Central Railroad Company,
The Lehigh Valley Railroad Company.

The order of the commission of date March 23, 1889, here referred to, among other things provided that, "imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

The following of said roads, made parties defendant as aforesaid, filed answers alleging conformity with said order of the commission of date March 23, 1889, and that their inland rates are the same for traffic whether domestic or imported, and it is admitted by counsel for complainant "that there is no proof to the contrary;" to wit:

The New York, Lake Erie & Western Railroad Company,
The Lake Shore & Michigan Southern Railway Company,
The New York, Pennsylvania & Ohio Railroad Company,
The West Shore Railroad Company,
The Boston & Maine Railroad Company,
The New York, Chicago & St. Louis Railroad Company,
173 The Central Railroad Company of New Jersey,
The Philadelphia & Reading Railroad Company,
The Chicago & Atlantic Railway Company,
The Michigan Central Railroad Company,
The New York Central & Hudson River Railroad Company,
The Delaware, Lackawanna & Western Railroad Company and
The Chicago & Grand Trunk Railway Company.

Answers have been filed by all the remaining defendants. The following of these expressly or impliedly admit that since the order of March 23, 1889, they have accepted as their share of the through rate on traffic imported from a foreign country to interior points in the United States a less sum than they have contemporaneously charged for like traffic originating in the United States, to wit:

The Texas & Pacific Railway Company,

The St. Louis, Iron Mountain & Southern Railway Company,
The Louisville, New Orleans & Texas Railway Company,
The Illinois Central Railroad Company,
The Wabash Railroad Company,
The Southern Pacific Company,
The Union Pacific Railway Company,
The Northern Pacific Railroad Company,
The Baltimore & Ohio Railroad Company,
The Lehigh Valley Railroad Company and
The Canadian Pacific Railway Company.

As showing the grounds upon which these different carriers justify their action in this respect, which grounds are in some respects different from each other, a brief outline is here given of their answers.

The Texas & Pacific Railway Company avers that one of its termini is the city of New Orleans and that the circumstances and conditions surrounding its import traffic are substantially dissimilar from those affecting its domestic traffic, and that the controlling forces which make its rate on the former less than on the latter are the water lines from Europe around Cape Horn to the Pacific coast; the water lines directly to Mexican seaports; the water lines via the isthmus of Panama to the Pacific coast; the water lines to the Atlantic seaboard, together with the rail lines into the interior; water lines to the ports of New England, which connect by a through rail connection with the Canadian roads and then via those lines to the interior; the water lines to Montreal or Quebec, thence by the Great Lakes to Chicago or Duluth, and thence by the rail lines to the interior; the water lines to Quebec, thence by the Canadian Pacific to the ports of entry on the Canadian border, and the water line via New Orleans and the Mississippi river, St. Louis and other points reached by the inland carriers. A number of tariff sheets alleged to be on file with the commission are cited in the answer of this carrier for the purpose of showing the extent of the area by which it, by means of its rail connections, distributes imports.

The St. Louis, Iron Mountain & Southern Railway Company, in justification of its rates on import traffic, alleges that shipments of such property reach the United States by way of New Orleans, and thence are brought to its terminus by the Louisville, New Orleans & Texas Railway Company and the Texas & Pacific Railway Company; and the interior ports of entry both of its own line and the lines beyond are reached by the Pennsylvania Railroad Company and its connections, and also by the Canadian Pacific and the Great Lakes operating the other railroad connections; and the rates received by the Texas & Pacific and ocean-line steamers are influenced and controlled by the said two routes and by all the routes between New York and Chicago which are in direct competition with the Pennsylvania railroad and its connections.

The Louisville, New Orleans & Texas Railway Company avers that in order to get a share of the import traffic it accepts the same as contracted for by the ship agents at foreign ports, the through rate being usually divided between the ship and rail line, and that this is forced upon it by competitors by water—steamboats on the

Mississippi river and its confluents; and also that the Illinois Central Railroad Company is a competitor with it for the import traffic for all leading points from New Orleans and pursues the same course as to import rates in order to secure such traffic. It further alleges that neither the letter nor the spirit of the act to regulate commerce interdicts the acceptance by a carrier of a lower rate as its proportion of a through import rate than it charges for the like service for inland or local haul, the aggregate import rate being as large or larger than the local or inland rate.

The Illinois Central Railroad Company avers that while its proportion of the through rate from foreign to interior points on imported traffic carried by it has not been as great as the rate on the like domestic traffic, yet said entire through rate has in no case been less than the rate on the domestic traffic; that from the best advice it could receive on the subject this commission, by its order of March 23, 1889, did not contemplate that the inland proportion of such through rate must necessarily be the same as the local inland rate, and that any other view of the case would have obliged it to relinquish the traffic, as competing rail carriers had tariffs in effect on this basis and thereby controlled the traffic prior to the establishment by it of the through rates; but that since March 18, 1890, it has not taken for shipment any import traffic, and to its great detriment has refrained from the business, for the reason that to meet the action of the competing lines it would have to make a less rate on the import than on the domestic traffic. This lets the Illinois Central Railway Company out.

174 The Wabash Railroad Company alleges that while it has in some instances accepted a less amount as its proportion of the through rate on import traffic than it has for the regular domestic rate between the same points, yet it has not at any time received from any person or persons less compensation for the transportation of property from one State into or through another State than it received from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of property under substantially similar circumstances and conditions.

The Southern Pacific Company avers that its import business is carried on as a connecting and constituent carrier in through freight lines under joint through rates from China and Japan and from England and Europe to interior points in the United States, said through freight lines being composed of ocean carriers from China and Japan to San Francisco and across the continent to the Atlantic coast, and of ocean carriers from England and Europe to New Orleans and connecting railroad lines across the continent to the Pacific coast. That its reasons for accepting proportions of such through rates less than its rates on domestic traffic are that the circumstances and conditions of the transportation are substantially dissimilar because of the competition of controlling force in each of the following particulars and respects:

First. By steamers passing from ports in Japan and China through the Suez canal direct to the Atlantic seaboard of the United States, and by vessels sailing direct from said ports to the said Atlantic sea-

board, and by steamers from said ports to Vancouver with connecting lines across the continent on British territory.

Second. By steamship lines running from the ports of England and Europe in connection with rail lines across the isthmus of Panama to the Pacific coast, but to a greater extent by ships, principally foreign, sailing from English and European ports direct to the Pacific coast generally for a return cargo of wheat and other products of California and adjoining States and Territories; that by said joint through rates from China and Japan and England and Europe it has been able to receive some traffic important in amount and earned something over the actual cost of transportation, which it could not have secured and earned except by participating as a constituent carrier in through lines and by accepting a proportional share of through rates.

Third. That the traffic from China and Japan is in teas; said teas are received by it at previously appointed days and in very large quantities, so that such traffic can be transported in special unmixed trains and on this account can be carried at less cost than other like traffic not so received and shipped.

The Union Pacific Railway Company alleges that it is engaged in the import traffic between Asiatic ports and points in the United States, and also between European ports and points in the United States; that its lines are intermediate lines and on Asiatic business via San Francisco the Southern Pacific Company, and on European business via New Orleans and Fort Worth the Southern Pacific Company and the Houston & Texas Railroad Company, and via New Orleans and Kansas City the Louisville, New Orleans & Texas railroad and the Kansas City, Fort Scott and Memphis railroad; that the proportion of the through rate it receives on import traffic, though less than its domestic rate, yields in the aggregate a margin of profit; and the lines of which it forms a part are unable to obtain any greater compensation than is charged, on account of the competition of other carriers not subject to the provisions of the act to regulate commerce, and that if not allowed to continue to handle this traffic as at present it will be wholly diverted to lines of transportation beyond the control of this country, to the serious loss of the respondent.

The Northern Pacific Railroad Company alleges that it is a connecting and constituent carrier of import traffic in through freight lines under joint through rates from Japan on ocean steamers to Tacoma, Washington, and thence with connecting railroad lines across the continent to the Atlantic coast, and also carries under through rates a small amount of such traffic from St. Paul, Minnesota, to points on the Pacific coast, said traffic coming on ocean steamers from English and European ports to Montreal, Canada, and thence via the Canadian railways to Sault Ste. Marie and thence via the Minneapolis, St. Paul & Sault Ste. Marie railway to the respondent at St. Paul. That it is compelled to accept as its proportion of the said through rates a less amount (but yielding more than the actual cost of movement) than its rate for a like service on domestic traffic by active competition of controlling force, in one case

by vessels plying between English and European and Pacific coast points via Cape Horn, and in the other case by steamers passing from the ports of China and Japan through the Suez canal direct to the Atlantic seaboard of the United States, by vessels sailing directly from said ports to places on the said seaboard, and by steamers from said ports to Vancouver, then by connecting railroads across the continent on British territory, none of said carriers being subject to the act to regulate commerce. It further alleges that the traffic from Japan is in teas and is received at previously appointed days and comes in very large quantities, so that it can be transported in special unmixed trains at less cost than other like traffic not so received and shipped.

175 The Baltimore & Ohio Railroad Company avers that its acceptance as its proportion of the through rates on imported traffic from England via Baltimore to points in the United States at somewhat less than its inland tariff rate violates none of the provisions of the act to regulate commerce, because the rates that can be obtained for the carriage of such through business to Chicago and other competitive points are fixed and limited by the rates made by the ocean lines plying to Montreal, Portland and Boston in connection with the Canadian lines of railroad, and in order to get any of said business at all it is necessary to meet said rates made by said competing lines.

The Lehigh Valley Railroad Company avers that the circumstances and conditions attending the transportation of import traffic are in many respects dissimilar from those attending ordinary inland traffic, but that the rates charged by it on import traffic since March 23d, 1889, have been and are the same as the rates contemporaneously charged for domestic traffic, except—

First. In the case of contracts outstanding for a certain through import rate during a fixed unexpired period.

Second. In cases where the import rates are, as is usual, called for by the importer in advance of shipments and it happens that after such rate has been fixed upon the steamship rates were unexpectedly raised, or errors occurred in making the estimates for the through rate, they fall upon the foreign ocean and inland transportation and said through rate has proved to be less than the sum of the several tariff rates at the time of the shipment.

The Canadian Pacific Railway Company avers that its lines do not extend to any of the Atlantic ports and that it has no traffic or other agreement with connecting American lines reaching said ports or with any Atlantic steamship lines with such ports in connection with any American railway lines by which imported goods are received at rates less than those charged on domestic or local freight; and that goods imported from foreign countries via Montreal for interior points in the United States are carried by it and charged the same rates as are charged on like goods shipped by the local merchants of Montreal. Tariff No. 117, dated May 1st, 1890, is attached to the answer of this company, under which, it is alleged, import and local shipments are carried.

The Grand Trunk Railway Company of Canada avers that in

response to an order of this commission it made a tariff of its full inland west-bound rates and added such tariff charges to those of its ocean steamship connections, with the result that for traffic for the United States via the St. Lawrence route, said steamship connections reported that on that basis they could literally obtain none in competition with the lower rates charged via United States ports. That defendant then made a special commodity tariff for its inland charges on certain articles therein named, but secured only a small share of the United States business. That during the winter season its ocean steamship traffic is done via Portland, but it is advised by its steamship connections that the rates are still not low enough to secure sufficient cargoes of United States and Canadian traffic, and the steamships on their outward voyage from Liverpool are compelled to ballast partly with coal and that this difficulty in obtaining traffic lies, as it is advised by its steamship connections, exclusively in the severe competition via United States ports. And it denies the allegation that the low rates via Philadelphia are necessitated by the action of its ocean steamship connections. It admits that there is a complete and independent water route from Montreal to Chicago by canal, river and lake, and says that it is advised by its steamship connections that they give consignors the option of shipping by water or by rail from Montreal. As evidence that it has filed tariffs in respect to said traffic in pursuance with the rules of the commission it refers to its interstate tariffs No. $\frac{D}{G\ 10}$ and $\frac{F}{G\ 4}$ effective July 27, 1889, and November 25, 1889, respectively.

The Material Facts Found.

The material facts as found in this proceeding are that complainant is a corporation composed of merchants and traders in and about New York city. The merchants and business men composing the New York Board of Trade and Transportation in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities and manufactured goods generally, are active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago and merchants in foreign countries who import direct on through bills of lading issued abroad.

The intervening petitioner, The Commercial Exchange of Philadelphia, is a corporation duly incorporated by the State of Pennsylvania for the purpose of the advancement of trade and the improvement of facilities for transacting trade in Philadelphia, and is composed of merchants and traders in and about that city engaged in the business as above stated.

The San Francisco Chamber of Commerce, also an intervening complainant, is a body similarly composed of merchants and traders in and about that city, and is duly incorporated under the laws of the State of California; a number of its merchants are importers

and merchants handling teas imported at San Francisco for supplying the American market.

After the proceeding had been commenced The Commercial Exchange of Philadelphia and The San Francisco Chamber of Commerce were permitted to intervene as parties complainant, inasmuch as the charges made by them against some of the defendant
176 railroads were similar in character to those made by the New York Board of Trade and Transportation.

Since April 4, 1887, the respondents have been railroads and corporations engaged as common carriers in the transportation of property from some one or more seaboard points in the United States or Canada to interior American points; such transportation being in all cases under some common control, management or arrangement for the continuous carriage, so that each of the respondents constitutes the whole or a part of some through or continuous lines of transportation so engaged as aforesaid under either its own or an established joint tariff, and each of the respondents is as to the said inland transportation within the provisions of the act to regulate commerce, approved February 4, 1887, as amended.

The respondents are common carriers who furnish transportation for all competitors at home and abroad who seek to reach interior markets lying between the seaboard and the interior. Each of the respondents is practically the whole or a part of some vast railroad system which reaches every important interior market.

Many American manufacturers and dealers in almost every line of manufacturing and business are the competitors of foreign manufacturers for supplying the wants of interior American consumers and under domestic bills of lading seek to require from respondents like service as their foreign competitors in order to place their manufactures with interior consumers.

On March 23, 1889, the commission made an order wherein, amongst other things, it was provided as follows:

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

The following roads allege conformity with the said order of March 23, 1889, and insist that their inland rates are the same for all traffic, whether domestic or imported; and there is no proof to the contrary:

The Lake Shore and Michigan Southern Railway Co.,
The New York, Lake Erie and Western Railroad Co.,
The New York, Pennsylvania and Ohio Railroad Co.,
The West Shore Railroad Co.,
The Boston and Maine Railroad Co.,
The New York, Chicago and St. Louis Railroad Co.,
The Central Railroad Company of New Jersey,
The Philadelphia and Reading Railroad Co.,
The Chicago and Atlantic Railway Co.,
The Michigan Central Railroad Co.,
The New York Central and Hudson River Railroad Co.,

The Delaware, Lackawanna and Western Railroad Co.,
The Chicago and Grand Trunk Railway Co.

Since March 23, 1889, it has been and is the practice of the following railroads to charge less than their inland tariff rates upon import traffic carried by them under through bills of lading issued at foreign ports by steamship lines running to American or Canadian ports at which the respondents' lines respectively terminate:

The Canadian Pacific Railway Company,
The Baltimore and Ohio Railroad Company,
The Wabash Railroad Company,
The Southern Pacific Company,
The Union Pacific Railway Company,
The Texas and Pacific Railway Company,
The Louisville, New Orleans and Texas Railway Company,
The St. Louis, Iron Mountain and Southern Railway Company,
The Illinois Central Railroad Company.

The Pennsylvania Railroad Company, the Pittsburgh, Fort Wayne & Chicago Railway Company and the Pittsburgh, Cincinnati & St. Louis Railway Company ceased this practice on the 30th day of September, 1889, as they allege, and there is no proof to the contrary.

The following table shows rates charged by the Pennsylvania lines for inland transportation under through bills issued abroad in cases where imports were carried by the American line to Philadelphia and thence by rail to Chicago:

Date - bill.	Points.	Goods.	Through rate.	Rail and ocean to Phila.	Inland, Phila. to Chicago.	Tariff, Phila. to Chicago.
1888.						
June 25	Dumferline, Scotland, to Chicago.	Linens.....	76.40 cts.	38.20 cts.	38.20 cts.	69 cts.
1889.						
March 4	Dumferline, Scotland, to Chicago.	"	88 "	44 "	44 "	69 "
July 1	Dumferline, Scotland, to Chicago.	"	80 "	40 "	40 "	69 "
June 25	Liverpool to Chicago.....	Anvils.....	29.47 "	14.73½ "	14.73½ "	33 "
Feb. 27	" "	"	26.79 "	13.38½ "	13.38½ "	33 "
April 15	" "	Tin plate.....	24 "	12 "	12 "	28 "
June 17	" "	Tin plate, c. l..				

The following table, compiled from data in the office of the Interstate Commerce Commission in regard to the tariff rates in evidence, shows through rates and divisions of through rates for the ocean and inland carriage on freights destined to the Pacific coast and imported from Liverpool through the port of New Or-
177 leans; and also freight rates on domestic shipments of like traffic originating at New Orleans, New York and Chicago:

Freight Rates in Cents per Hundred Pounds to San Francisco, Sacramento, Marysville, Stockton, San José, Oakland (Sixteenth Street), and Los Angeles, Cal.

Commodities.	From Liverpool, Eng., via New Orleans.			From New Orleans, La.	From New York, N. Y.	From Chicago, Ill.
	Ship's proportion.	Inland proportion.	Through.			
Agricultural implements	19	70	89	114	130	119
Blacking	19	70	89	106	120	110
Books	27	80	107	264	300	275
Boots and shoes	27	80	107	370	420	390
Burlaps	19	70	89	180	200	185
Buttons	27	80	107	374	420	390
Candles	19	70	89	125	150	130
Canned fish	19	70	89	106	120	110
Carpets	27	80	107	288	330	300
Cashmeres	27	80	107			
Cement	19	70	89	106	120	110
Chinaware	27	80	107	163	190	170
Chocolate	27	80	107	125	150	130
Cigars	27	80	107	370	420	390
Clothing	27	80	107	374	420	390
Confectionery	27	80	107	187	215	195
Cordage	19	70	89	125	215	130
Crayons and chalks	27	80	107	125	150	130
Crockery	19	70	89	125	150	130
Cutlery	27	80	107	326	370	340
Drugs, common	19	70	89	187	215	195
Dry goods	27	80	107	374	420	390
Earthenware	19	70	89	106	120	110
Feathers	27	80	107	374	420	390
Glassware, common	19	70	89	125	150	130
Gloves	27	80	107			
Glycerine	27	80	107	106	120	110
Groceries, N. O. S.	19	70	89	370	420	390
Hair goods	27	80	107			
Hardware	27	80	107	187	215	195
Hats and caps	27	80	107	370	420	390
Hosiery	27	80	107	374	420	390
Lace	27	80	107			
Leather	27	80	107	326	370	340
Linen	27	80	107			
Linen goods	27	80	107			
Milk, condensed	19	70	89	106	120	110
Nails	19	70	89	106	120	110
Optical goods	27	80	107			
Pins	27	80	107	264	300	275
Saddlers' goods	27	80	107	370	420	390
Soap	19	70	89	106	120	110
Soda, caustic, 2,480,162 lbs.	19	70	89	106	120	110
Tallow	19	70	89	106	120	110
Woolen goods	27	80	107			

This table does not reduce articles carried by "measurement" to "weight," because carriers furnished no data by which this could be done, but, taking this table as a basis and making allowance for the difference between "measurement" and "weight" of 53 to 54 per cent., as claimed in evidence, it shows approximately the difference between import rates and rates on other articles.

There is in every case of imported traffic a through bill of lading. Inland through bills of lading began quite early in the transportation business. As to the ocean it is a more modern method of business and has been more difficult to introduce. The amount of the through rate is substantially governed by the competition of other carriers. The through rate is a variable one. At Chicago it will frequently fluctuate every hour according to the supply of boats. The ocean rate does not fluctuate with such rapidity. The rail rate does not necessarily vary with the through rate unless the ocean line has some agreement with the railroad line to share the ups and downs. This fluctuation makes it more difficult to lay out business and gives advantage to favored shippers, if the rates are not published. It is very difficult to give publicity to frequently fluctuating rates.

The through bill of lading furnishes a collateral for the transaction of business; takes from the shipper and consignee both the care as to intermediate charges, elevators, wharves and cost of handling (which are fluctuating), and puts it on the carrier; it reduces the intermediate charges and very much facilitates the transaction of business and helps to swell its volume. The tendency of the through bill of lading is to eliminate the obstacles between the producer and consumer, and it has done much in that direction.

Imports are different to some extent in the case of different carriers; the rates are different as between the rail carrier and the vessel; in regard to some kinds of freight the methods of arriving at the rail rate are different in the case of some rail carriers to what they are with others; and it therefore becomes necessary to find the facts, in a brief way, in regard to each of the leading rail carriers of imported traffic.

The imports handled by the Louisville, New Orleans & Texas railway are heavy and bulky, consisting of tin plate, cement, soda ash and occasionally cotton ties. The proportion of the import rate received by this road is a paying rate. Between Memphis and St. Louis and to Kansas City the rail line gets sixty per cent. and the ship line forty per cent. of the through rate. To other Missouri River points the percentage is the same. The percentage of the through rate on the division between the steamers and the rail lines remains the same notwithstanding fluctuations in the through rate. The arrangement for such division is made by the railroad with lines running from Bremen, Antwerp, Havre, Liverpool and London. The rates are made by the shipping agents in Europe in competition with lines from said ports to all American ports other than New Orleans. The rate varies from steamer to steamer, and the rates do not reach any interior foreign point, but are only to and from the ports.

The through import rate bears no fixed relation to the inland tariff rate for the local service. There is only one restriction upon the percentage of the through rate as compared with the inland rail line from the port of entry to the interior destination, and that is
178 that the through rate from the European ports to the place of destination in the United States shall not be less than the rate from New Orleans proper to the place of destination on freight originating at New Orleans.

The tariffs on this import business are filed after the contract is made as soon as the road gets the proper showing that the goods are consigned.

The competition by the Mississippi river fixes the road's inland domestic rate north, and this competition practically bears the same relation to the inland domestic carriage as to fixing the rate that it bears to the import rates, but that which reduces the road's proportion of the through rate below the regular inland tariff rate is competing conditions existing in foreign ports—the through rate at North Atlantic ports. On a shipment from Liverpool to St Louis the road and its through-line connection would have to compete with the Cunard line, the International line and other lines running from New York, and with the trunk lines and others, and particularly the Baltimore & Ohio railroad, on tin plate.

The objects of this carrier in taking import traffic at the reduced rate it is compelled to take it are to build up the city of New Orleans and to secure the income from it for paying hands and operating expenses. The import traffic of the road has been growing largely in the last three years and the income from it amounts, as is estimated by a witness who occupies one of the chief offices of the road and is in a position to be familiar with its revenue, from fifty to sixty thousand dollars a year, and perhaps more.

The through rate on tin plate from Swansea, Wales, to Memphis would be about 27.5 cents per hundred pounds, and the rate or the railroad's proportion of this from New Orleans to Memphis, a distance of 450 miles, would be about 12.54 cents per hundred pounds. There are no local shipments of tin plate from New Orleans to Memphis and no inland tariff on it.

The competition of the Mississippi river with the defendant rail carrier on import traffic is indicated by the following figures:

For the year ending February 28, 1890, the imports through New Orleans were:

By river, 6,866 tons; value, $271,067.
By rail, 1,622 " " 85,288.

About forty per cent. of the north-bound cars of the Louisville, New Orleans & Texas railway go empty. The tendency of the river competition is to keep import rates to the West very low, so low that the company does not undertake to compete with them, except at intervals, for the St. Louis business.

In 1889 the importations of the Texas & Pacific Railway Company were about five millions of pounds of import business, of which about 2,500,000 pounds went to Missouri River points, about 2,000,000 pounds to the Pacific slope, California terminals and Ore-

gon points, and the remainder was distributed in Colorado, Utah, and a little of it in Texas.

The St. Louis, Iron Mountain & Southern railway is a connection of the Texas & Pacific railway in the business to Missouri River points. The Texas & Pacific reaches the California terminals over the Southern Pacific and Oregon points over the Southern Pacific and over the Denver, Texas & Fort Worth railroad, in connection with the Union Pacific railway and the Oregon Railway & Navigation Company. It reaches Montana over the Denver, Texas & Fort Worth railroad and over the Union Pacific railway.

The rate of the Texas & Pacific railway to Montana points is the sum of the locals, and also to Denver, on caustic soda and soda ash. In instances of other freight it takes its share of the through rate. In the case of Missouri River business the rate is usually made by the agents of the Texas & Pacific Company and by the steamship agents. There is some cement, but tin plate and earthenware constitute ninety per cent. of the freight carried to Missouri River points.

The proportion the Texas & Pacific railway receives of the through rate is remunerative. The preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative that can be obtained to put in its cars to pay milage.

Freight pays the Texas & Pacific railway about an average of one-half a cent a ton a mile. That road carries about 200,000 bales of cotton to New Orleans and there is but little sugar and molasses to load back.

The St. Louis, Iron Mountain & Southern road gives the Texas & Pacific railway sixty per cent. more loads than the latter returns to the former. Generally the cars are handed back to the former empty.

There is a sugar-refining business and some cotton mills at New Orleans, but there cannot be said to be any manufactories there to any considerable extent.

The competition which controls the making of rates to the Pacific coast (California rates) and any Oregon business is steamship through the isthmus, and there is some little competition in cheap heavy goods around Cape Horn. The competition to interior points, such as Missouri River points and Denver, is from the trunk lines direct from the Atlantic seaboard.

The through rate from foreign points via New Orleans to the Pacific coast is $1.07 per hundred pounds, of which the rail line's proportion is 80 cents, and the return ocean rate from New Orleans is about the same as the ocean rate to New Orleans, namely, 27 cents.

179 The European railroad competition between the places of origin and the seaboard does not cut any figure in fixing the through rate because the rate from the interior to the ports of Europe is very much the same by all lines; it is the competition between the ports of Europe and this country that makes the rates.

The tariff of the Texas & Pacific railway to California and Pacific coast terminals is published and has been at that figure for a

long time. The road has made that rate and said to its steamboat connections they can go no lower. The road loses business frequently on that account. That is the difference between the California and the Missouri River business.

The steamship agents in Europe agree upon the through rate on Missouri River business and the road gets its agreed percentage. This road gets its full local rate to Dallas every time and carries import traffic at the reduced import rate to Missouri River points and California terminals only. The regular local rate is charged on everything to Denver except earthenware; the import rate on that is 93 cents, while the regular local rate is $1.00. The Texas & Pacific railway has an agent in England watching these rates all the time.

Over the line of the Southern Pacific Company merchandise from the ports of the United Kingdom and Europe by steamer to New Orleans and thence by rail to the Pacific coast on entire through rates is divided as follows:

Iron, cement and tin plate, about 33 to 36 per cent.

Wines and liquors, about 10 per cent.

Dry goods and linens, about 15 or 16 per cent.

Groceries, about 10 per cent.

Mineral water, about 7 per cent., and the balance sundries.

Of this entire through rate the railroads received on the first and second classes above 75 per cent. and on the third class about 78.3 per cent. The balance of the through rate goes to the steamer. The Southern Pacific Company carries with three or four connecting steamer lines on the through-rate system and has tariffs fixed with these routes to California terminals and on file with the commission. In comparing the railroad's proportion of the through rate with the regular local rate it is to be noted that fully thirty or forty per cent. of the import business of the road is what is called "measurement" freight. All tariffs from Europe are printed "either weight or measure at ship's option." The charging by measurement makes the road's import rate from $2\frac{1}{2}$ to $2\frac{3}{4}$ times larger than it would be in charging by actual weight, and this greatly reduces the apparent difference between the import rate and the low inland rate on about 45 or 48 per cent. of the business carried. This would make an increase of the apparent rate of the whole business carried of 53 or 54 per cent.

The road ships a different class of goods by the regular domestic inland rate to those brought under the import rates. The proportion of the through rate received by the railroad on import traffic does not pay a full and fair return for the service rendered, but it is taken because on account of competition by the Atlantic lines no higher rate can be had. This competition arises in the ports of Europe and the United Kingdom and seaports where the through-rate shipments are entered. Of the freight carried from the ports of Europe and the United Kingdom to Pacific coast terminals by all lines around Cape Horn, across the isthmus, and over the railroad by way of Aspinwall, the Southern Pacific estimates that it carries about nine per cent.

The interior through rates of the road are somewhat higher on third-class goods than the rates by way of the isthmus of Panama and are about fifteen shillings lower on first class and about ten shillings higher on second class than the rates around Cape Horn. The import tonnage carried by the road in 1890 was about 14,000,000 pounds.

The interior and import rate does not apply to any part of the road's line except California terminals, for the reason, as is alleged, that the competition does not reach the interior points. On one portion of the import traffic carried by the road, namely, that carried by measurement, being about 45 per cent. of all, the road gets 2½ times as much as the tariff printed and filed shows, and on the remaining 55 per cent. the road gets the rate shown and both are for the same service.

The term "ship's option, weight or measurement" does not mean that it is an option, but that whenever the bulk is lighter than the weight it must be taken by measurement.

The Southern Pacific Company engages in traffic from the United Kingdom and European points via New Orleans and from Asiatic points to all points in the United States west of the Missouri river. As a rule the proportion of the entire through rate received by said company is less than the rate charged on the domestic traffic.

The business of the road on through freight from the United Kingdom and Europe is very small. The principal commodity is tin plate, being about one-third of the total. The rest is made up of mineral waters, liquors, a few dry goods, and a small quantity of wine and a little machinery. Sixteen per cent. would cover the dry goods and 10 per cent. the liquors. Tin plate goes to the Pacific coast for canning fruit and fish.

These through rates from Europe and the United Kingdom apply only to California terminals; to all intermediate points the regular inland locals are charged. The reason of this distinc-
180 tion is that at the Pacific coast terminals there is water competition by sailing vessels by the Cape Horn route, and steamships connecting with the Panama railroad at Colon, which connects with the Pacific Mail Steamship Company at Panama.

The largest share of the tonnage is carried by sailing vessels around Cape Horn at nominal rates, the reason being that British vessels largely seek the port of San Francisco for return cargoes of grain. These vessels take a general cargo to San Francisco, the bulk of it being coal and cement, for which the Southern Pacific cannot compete. But they also carry case goods, general merchandise, liquors in a variety of packages, and in fact run through the whole category of traffic. It is not an infrequent thing for the vessels to come from Europe to San Francisco in ballast. The coal that comes by these vessels from Liverpool and other ports in the United Kingdom competes with the production of the Pacific coast.

The Pacific mail steamship rates are considerably higher than the rates by sailing vessels. The sailing-vessel rates vary a great deal, ranging on general merchandise from 15 shillings, 6 pence, to

35 shillings, 6 pence; and on tin plate from 17 shillings, 6 pence, to 32 shillings, 6 pence, per ton of forty cubic feet or 2,240 pounds, ship's option.

The rates of the Pacific mail line range from 57 shillings, 6 pence, to 95 shillings per ton of 40 cubic feet. The rates of the Southern Pacific Company range from 100 shillings to 83 shillings per ton of 40 cubic feet or 2,240 pounds, ship's option.

The canners on the Pacific coast are not able to determine in advance how much tin plate they will require; after their wants are known, depending on the prospect of the year's crop or salmon pack, they order. There is therefore a necessity for quick passage of tin plate, and this, together with the fact that tin plate is very valuable and interest and insurance mount up rapidly, accounts for the road's being able to get such a large share of the tin-plate traffic. Tin plate is forwarded from New Orleans under the company's general bond and the duty is paid in San Francisco, but it has to be appraised at the first port of entry.

The ships engaged in carrying to San Francisco around Cape Horn are almost wholly British bottoms.

The road's proportion of the through rate would not, in the absence of competition, be a full and fair return for the transportation service rendered. It is justified on the ground that it gives to the road something more than the actual cost of movement of the freight. The theory is that whatever the road gets above the actual cost of movement of this traffic is so much gained and it is thereby better able to discharge its fixed obligations, such as interest and those items of the general expense which do not vary with the amount of tonnage or traffic.

The road's import traffic is increasing and has about doubled, comparing 1885 with 1889. All this traffic went by sailing vessels and steamship lines via Panama until the Southern Pacific Company opened the New Orleans line. The claim of the company now is that not one-tenth of it is carried by its line, and that without the reduced through rate and the through line the road would get none of it.

So far as Europe is concerned the Southern Pacific Company does not regard the Canada lines as being serious competitors with it. The Northern Pacific Railroad Company carries little, if any, of this particular traffic. The nine-tenths of the traffic not carried by the Southern Pacific Company, it is estimated, is carried by sailing vessels via Cape Horn and steamships via Panama.

The principal article of import from Asiatic ports about which there is serious competition between the American and the Canadian lines and sailing vessels is tea.

About ninety million pounds of tea are annually imported into the United States and Canada from China and Japan by the following routes:

Steamship via San Francisco and rail.
Sail via Tacoma and rail.
Steamer via Vancouver and rail.
Steamer via Suez.

Sail via cape of Good Hope.
Sail direct to San Francisco for local use.

About fifty or sixty per cent. comes by Suez or the cape of Good Hope. These teas reach the Atlantic seaboard by all the said routes, except the teas which come by sailing vessel to San Francisco direct for local consumption. The Suez rate is generally small—the cheapest. Shipments by way of the Suez canal to the Atlantic seaboard require fifty or sixty days from Japan and forty or fifty days from China.

The voyage by sea around the cape of Good Hope is from four to six months from Japan and from three to four months from China. The prevailing rate on teas from Japan via the Suez canal to New York is about seventy cents per hundred weight. The tea is taken only to New York because that city is the center of the tea trade. On tea consigned from Japan to San Francisco the rate is generally $1 per hundred weight. The rate from Japan via San Francisco and thence by rail to New York is $1.50 per hundred weight and the through rate via Vancouver over the Canadian Pacific is the same; but sometimes there is a differential of 25 per cent. The Canadian Pacific can reach Chicago by lake carriers from Port Arthur and has done so with regard to other freights than tea, but there is no evidence that it has ever done so in the case of tea.

181 The steamers passing through the Suez canal are British; the sailing vessels mostly fly the American flag and are generally kerosene-oil vessels. These oil vessels are considered the best to charter for cargoes of tea. The rate on tea to the Pacific coast is controlled by the rate made by the Suez steamers. The San Francisco merchant is charged three dollars for the transportation from San Francisco to New York. The tea merchant in Japan has an advantage over him in the through rate of $1.20 from Japan via San Francisco and thence by rail to New York, if he desires to enter the New York market, but there is nothing to prevent his shipping to New York direct.

Before the practice of shipping on through bills through San Francisco was adopted (about 1867) shipments were made to New York entirely. New York now gets about 50 or 60 per cent. of the tea imported into this country. Some tea goes to New York, some to Chicago, some to Montreal and other places. When it comes by through bills over an American road it costs the same to take it to Chicago as to New York. New York and Chicago are practically the two American tea markets.

The teas brought into the United States and Canada by rail carriers are from Japan. The following table will show the teas imported into the United States and Canada from Japan from the year 1875 to 1889 inclusive:

Season.	Via San Francisco.	Via Vancouver.	Via Suez.	Sailed to New York.	Via Tacoma.	Total.
1875–'6.....	13,323,946	.....	1,906.235	9,980,621	.....	25,210,802
1876–'7.....	11,110,057	.....	5,337,980	5,982,300	.....	22,430,337
1877–'8.....	14,448,229	.....	5,590,647	3,232,708	.....	23,271,584
1878–'9.....	12,209,728	.....	12,028,604	1,262,248	.....	25,500,580
1879–'80....	17,222,299	.....	15,092,653	2,334,527	.....	34,649,479
1880–'1.....	18,317,027	.....	20,167,157	1,013,776	.....	[illegible]
1881–'2	19,718,806	.....	14,549,262	.....	.....	wants are
1882–'3.....	12,333,987	.....	21,668,376	532,422	.....	salmon
1883–'4.....	16,217,369	.....	18,017,876	22,538	.....	34,zsage
1884–'5.....	15,589,961	.....	19,818,428	.....	.....	35,408,5o.
1885–'6.....	19,048,022	.....	16,730,911	315,951	2,998,517	39,093,401
1886–'7.....	21,972,555	10,322,368	12,994,502	.....	.....	45,289,425
1887–'8.....	17,414,589	10,063,766	8,779,827	.....	6,840,971	43,099,253
1888–'9.....	11,903,314	9,576,580	8,848,056	248,693	9,243,404	39,820,047
1889 *.	14,242,700	5,175,557	11,559,994	103,981	6,862,537	37,924,769

* (Up to November 23, 1889, from Yokohama.) New York, January 13, 1890.

The following table shows the percentage of total imports of tea into the United States and Canada carried by the various routes at the dates named below:

Season.	Via San Francisco, Union Pacific and Southern Pacific.	Via Tacoma, Northern Pacific.	Total via American lines.	Via steam, Suez route.	Via sail vessels.	Via Vancouver, Canadian Pacific.	Total.
1875–'6 ..	52¾ %	.....	52¾ %	7½ %	39⅜ %	.....	100
1882–'3 ..	35⅜ %	.....	35⅜ %	62 %	2¼ %	.....	100
1885–'6 ..	48½ %	7⅜ %	56¼ %	42¾ %	1 %	.....	100
1886–'7 ..	48½ %	.....	48½ %	28½ %	.....	23 %	100
1887–'8 ..	40½ %	15⅜ %	56¼ %	20¼ %	.....	23½ %	100
1888–'9 ..	30 %	23¼ %	53¼ %	22¼ %	.....	24½ %	100
To Nov. 23, 1889.	37½ %	17¾ %	55¼ %	30 %	.....	14¾ %	100

The Southern Pacific Company carry it under a through rate with the Pacific Mail Steamship Company and the Occidental and Oriental lines, which serve all the ports of China and Japan and connect with the Southern Pacific Company at San Francisco. The tea rates are made by the agents of connecting lines. Whatever the rate is the road takes fifty per cent. subject to one cent per pound minimum to the road—that is the road's proportion of the through rate is in no case to be less than one cent per pound; as, for example, if the through rate be one and one-half cents the road's share would be one cent and the steamer connecting lines would take the one-half cent. In any other case the through rate is divided equally between the road and the ship.

The bulk of the teas comes via Suez. From 75 to 80 per cent. of

the total importations of teas into the United States and Canada goes to New York; 60 per cent. of that total comes via Suez; the remaining 20 or 25 per cent. comes to the interior, chiefly to Chicago and Canada points.

Opportunities are frequent for the Chicago importers to use the Suez canal and either pay the all-rail rate or the lake-and-rail rate. It is estimated by the general traffic manager of the Southern Pacific Company that during the season of 1889–'90, beginning with May, 1889, the Southern Pacific Company carried via San Francisco gross about 22,000,000 pounds of teas, the Canadia Pacific about 12,000,000 pounds gross and the Northern Pacific about 7,000,000 pounds gross, making a total of about 41,000,000 pounds carried across the continent, either over Canadian or United States territory. The quantity that was taken by way of Suez or the cape of Good Hope approximated 48,000,000 pounds gross.

Originally the Southern Pacific Company began with a
182 rate of five cents per pound, the tea being high priced as new tea and quick transit being desirable. Then as the desire for quick transit ceased the rate dropped during the season to four, three and two and one half cents; but since the Canadian Pacific laid on their line the Southern Pacific Company had to be in with a lower rate. For example, in 1889 it began with four cents and got a half a cargo and soon got down to three and two and closed with a 1½ rate; and this year, 1890, had to begin with a rate of two cents and have notice from the steamship manager that the rate will go to one cent before the close of the season.

The rates via Suez to New York are always lower, ranging from .8 cents per pound to about 1.8 cents per pound. A comparison should be made between the rate via Suez and New York of 1.8 cents with the road's rate of three or four cents, and the Suez rate of .8 cents with the road's rate of one and a half cents. The Suez route has heretofore dictated the rate, though three cargoes carried from China via the cape of Good Hope as shown by the evidence were carried at the rate of 25 cents per hundred pounds, or one-quarter of a cent a pound; and according to the same evidence the highest rate known by that route was 60 cents per hundred pounds.

The rate of the Southern Pacific Company on tea, a shipment which originates at San Francisco, is in car-loads $1.55 per hundred pounds and in less than car-loads $3 per hundred pounds, a flat rate extending from the Missouri river to the Atlantic seacoast. The difference between the import rate and that from San Francisco grows out of the competition at the ports of China and Japan which does not exist at San Francisco.

The ground upon which said rate on tea from San Francisco is justified by the Southern Pacific Company as being reasonable in itself as compared with that of other like commodities is that tea is ordinarily first-class freight, being a valuable article, bulky in its nature and sensitive to damage, and must bear its proportion of the fixed charges.

The tea traffic originating at San Francisco is very small because the tea traffic is controlled in the East, originally in New York and

now in New York and Chicago. Before the transcontinental lines were completed San Francisco shipped no tea. It is estimated that last year San Francisco shipped in car-loads and less quantities about a million pounds of tea. San Francisco supplies altogether the country adjacent; it supplies Salt Lake and also Denver.

There is a slight difference in the cost to the railroads in the transportation of tea on the through line, the transportation which originates at China and Japan, and the cost of shipping teas, the origin of shipment being in San Francisco; and the difference is in favor of the through bill; but this difference is not regarded as one of any importance.

The through rates are not restricted to consignments of car-loads, but apply to consignments of less than car-loads. The bills of lading which the San Francisco merchants have presented show rates for shipments locally from San Francisco on one or two packages compared with shipments of twenty or more packages of through rates. In reply to this it is said by the company that such a comparison is not fair because when it gets down to two or three packages there is an arbitrary rate charged by the steamer which is not the case in larger quantities.

The average of the road's percentage of the through rate is much more than two cents a pound. That is, it averages more on teas from China and Japan for the service than on its car-load rate from San Francisco. But how long this will continue is considered doubtful. Prior to the establishment of the Canadian line, the wide distinction that now exists between the local rates from San Francisco, and the through rates from China and Japan did not exist. It is claimed by the Southern Pacific Company that the Canadian Pacific Company forces this result. One reason why it is said the Canadian Pacific railway has been able to force this result is that it reaches New York on shorter time, as it saves quite a considerable distance—600 miles—in the steamship runs.

The proportion that the Southern Pacific Company receives of the through rates on teas with the reservation of not less than $1 per hundred minimum to the road or one cent per pound, pays something over the cost of movement. The actual cost of movement of freight east-bound from San Francisco will not exceed three-eighths of a cent a ton a mile. Whatever the road gets above that is something over and above what it costs to handle it. It appears that this company does not carry any of this tea for less than half a cent a ton a mile, and hence it secures at even that rate a profit of one-eighth of a cent a ton a mile.

The general manager of the Southern Pacific Company testified that he had endeavored to bring the steamers that are operating in connection with the Canadian Pacific and Occidental and Oriental and Pacific mail lines together and to get the Canadian Pacific and the Northern Pacific and his own line, the Southern Pacific, to agree that they will fix arbitrary rates from the ports of entry only with provisions that they can charge them regardless of what the fluctuations are, and say they will continue to do so until the steamer lines stop their quarreling and get things back to a reasonable basis.

The Northern Pacific Company was eager for this but the Canadian Pacific answered that they could not do it.

183 The evidence in behalf of the Southern Pacific Company further showed that the effect of any attempt of that company to increase the through rate upon traffic would be to cause it to leave that road and to leave the port of San Francisco and under the present policy to go via Vancouver and the Canadian Pacific; that it would be an absolute disadvantage to the board of trade and transportation of New York and Philadelphia to take away tea from the American lines and to give it to the British lines; that the Southern Pacific Company has no quarrel with San Francisco in this matter, but cannot do what San Francisco wants because the law forbids it; and that the through rate is a rate which the Southern Pacific is forced to take by the circumstances and conditions which are not within its control and which exist at the ports of China and Japan and do not exist at the port of San Francisco.

There is also testimony to the effect that the Canadian Pacific Railway Company is now completing vessels, which under the admiralty laws of England will obtain a subsidy of 60,000 pounds sterling ($300,000) per annum, and it will put these vessels on early in 1891, and that it is expected when this is done that these vessels will make the time between Yokohama and Vancouver in ten days.

Over fifty per cent. of the teas imported into the United States by all the lines is China tea. But the proportion that comes overland is greater of Japan teas than China teas. Three-fourths of that portion which comes via the Pacific coast to the ports of the United States is Japan tea; not more than one-fourth is China tea.

All of the official publications as to export rates, etc., of teas deal with the contents of the package and not the gross. The percentages of the totals received on the Pacific coast at San Francisco and Tacoma together have, relatively to the total receipts on that coast, increased during the last three years, and the American lines have increased their tonnage, but the percentage of that increase is not shown by the evidence.

Before the opening of the Vancouver route no teas of any consequence went that way; the teas then went via San Francisco and at higher rates than today; and the percentage of the tea traffic which has gone through the Suez canal during the last two or three years has been about sixty per cent.

The vessels used from Port Arthur across the lake to Chicago, it is claimed, are American vessels, for the reason that none but American vessels can participate in the coastwise trade.

It appears that the steamer classification of the different kinds of goods under which the steamer ships on through bills is different from the railroad classification under which such freight is shipped over the railroad; consequently under these through bills articles would be carried in a different classification from that which prevails if they are shipped from the seaport to the interior.

The earnings of the Southern Pacific on tin importations are five-eighths mills per ton per mile, and the tariff on tin plate from

New Orleans would probably take a rate of a cent a pound, which would be four-fifths of a cent per ton per mile.

The average time of a sailing vessel from Liverpool to San Francisco is four months, frequently 95 days, and sometimes in distress six months. The time of the Southern Pacific and its connections from Liverpool to San Francisco is 25 or 26 days.

If the through rate should go considerably below 1½ cents a pound on tea the Southern Pacific Company necessarily would have to abate its minimum one cent or the steamers could not run. Any rate that is made by the Canadian lines or their steamship connections under the policy they now adopt would have to be made by the Southern Pacific or else it would have to go out of the business. The general manager of the Southern Pacific Company testifies that as he understands the Canadian contract the Canadian Pacific has no control over the through rates or over their proportion of these rates; that the difference between the Canadian Pacific and the Southern Pacific is this: While the Southern Pacific agrees that subject to its one cent minimum it will take 50 per cent. of the rates, it is not tied up in a contract that would prevent it any day from changing these provisions; while the Canadian Pacific is tied up by such a contract. This matter will be found explained by the testimony offered in behalf of the Canadian Pacific Railway Company, which will be noticed hereafter in this report.

The one cent a pound that the Southern Pacific Company gets is for car-loads and less than car-loads, subject to the exception where the steamer makes a difference on one or two packages given it alone; and also subject to the exception as to how this business came to the Southern Pacific Company. The difference which the road gets in a small consignment of two or three packages of tea under the through bill is determined by the steamer, but at any time that the road wants to change this it can do so.

Whatever the steamships get higher than the one cent minimum rate is for them to determine, in one sense, but, as before said, the road can change these provisions and its relations to the steamship companies any day it chooses. It is admitted by the Southern Pacific Company as being possible, but extremely improbable, that on these through bills, under the arrangement between the steamships and the Southern Pacific Company, less than car-loads
184 will be carried at a cent a pound, while the San Francisco merchant desiring to ship a car-load to the East would have to pay $1.55 per hundred pounds. The San Francisco shipper would have to pay $1.55 per hundred pounds in car-loads, and in less than car-loads $3, whereas the through shipper pays one cent a pound for the same transportation.

The difference that is made is not based on the cost, for it is admitted by the Southern Pacific Company that the difference would be unappreciable in the cost of handling like quantities of tea as between San Francisco local shipments and a cargo from the ship. No evidence has been introduced that there has ever been such a thing as the diversion at San Francisco of freight on these through bills from its destination to a local consignee.

It is further admitted by the Southern Pacific Company that if all the competitive difficulties in the foreign ports were eliminated, there would be no reason why the inland tariff should not be a rate for all the business, whether carried under a through bill or a local bill.

On shipments from New Orleans the rates are not fixed by the Southern Pacific Company's agent in Europe, but the rates are the published tariff rates, which are the subject of agreement between the traffic manager of this company's Atlantic system and the representative of the steamship lines, whose headquarters are at New Orleans, and whose action is subject to the approval of his home office. The steamship agents have no authority to depart from the rate in the tariff without the road's consent. That consent is obtained from Mr. Schriever, traffic manager of the Atlantic system of the Southern Pacific Company. The rates are not fixed from shipment to shipment.

If an occasion should arise where, in respect to a very important class of freight, a modification of that tariff was necessary, a communication would probably come from the home office in the European port to their representative in New Orleans, and he would confer with Mr. Schriever, and Mr. Schriever would approve or disapprove of that change. If Mr. Schriever approved of it, the rate would be put into effect, but not before, and it would then go into effect immediately; there would be no ten or three days' notice.

The foregoing is admitted by the Southern Pacific Company to be its practice and method of procedure in regard to this class of freight.

Of the 14,000,000 pounds of freight reported in 1889 about forty per cent. was taken at an estimated weight, or, in other words, that 14,000,000 pounds represents a tonnage of 36 per cent. more than the actual tonnage carried. About 33¼ per cent. of that tonnage, which is tin plate, goes by the actual weight and is figured at 3,507,000 pounds on that 14,000,000 pounds. It would really be a greater proportion of the whole if the exact weight of all was given. Witnesses for the Southern Pacific Company testified that they have never known of a case of tin plate being taken on a through bill to local points on that road's line. They further testified that there is no appreciable difference in the circumstances and conditions which affect the expense to the road at New Orleans in handling import goods and in handling local goods.

In explanation of its calculations the general manager of the Southern Pacific Company testified before the commission that when he said the road's rate paid the cost of the trainmen he included in that case the pay of the crew, the cost of fuel, the proportion of the contract repairs based on the ton miles made in the ratio of the ton miles that the car or train would make to the total ton miles of the road—the expense of loss and damage figured on the same basis; these are the principal, and it may be said the total, charges against the actual cost of movement—the only charges which may be said to be influenced by the varying conditions of the traffic, whether it is more or less. He further testified that

when he speaks about the cost of transportation as being 1¼ cents he includes everything—fixed charges, general expenses, taxes and repairs.

It appears that the Southern Pacific Company has retained its proportion of the traffic at the lower rates forced by the Canadian Pacific and that the latter took what traffic it obtained from other competitors. It further appears that the present condition of the east-bound rates has been caused by the competition of the Canadian Pacific Railway Company and the American transcontinental lines with each other. The difference in the tea trade between the gross and net weight is about 25 per cent.

Evidence was offered at length by the Canadian Pacific Railway Company from which the following appears:

That the through rates of this company via Montreal to American interior points are generally made by the steamship companies. The road connects through the regular lines, the Allan, the Dominion, the Beaver, the Thompson and the Donaldson lines, and they generally make the through rate. When the road makes the rate it is made on the rate ascertained from the ocean carriers, to which are added the road's inland rates from Montreal to destination. These local inland rates are published and the tariff is sent to the Interstate Commerce Commission and applies to any line of steamers bringing traffic to the road at Montreal. The tariffs No. 1021 of May 1st, 1890, and No. 6, dated May 10th, 1889, show the inland proportion on all import traffic the road brings from
185 Europe via Montreal. Montreal is the only port at which the road receives imports. It has no connection to Portland.

The road does not make import rates from Montreal to points in the United States in connection with any American lines of steamers. These import rates via Montreal have been in effect two years. There was great difficulty in getting the steamship companies to agree to these rates, because, as they said, of the terms and rates which they had been in the habit of receiving from the American lines running to the ports of Baltimore, Philadelphia, and New York.

The Allan line is probably one of the largest steamship lines in the world, running between 45 and 50 steamers and to almost every point.

As to Asiatic trade, three years ago the Canadian Pacific Railway Company in connection with a line of steamers owned by parties in England became a competitor for that traffic, finding it advantageous to do so on the propositions made to the company by the connecting steamships. This is the fourth season the road has been in that traffic. It was taken in connection with the steamships on a division arrangement of through rates. The service that is now running is temporary and will be displaced in the course of four or five months by the railway company's own new vessels. The arrangement of the company with these steamship lines was similar to that of the American lines, but in October last the steamship companies notified the road that they would cease to connect further unless it changed the terms under which they were connecting. The steam-

ship companies wanted a larger division of the rates and more power to control the business. The Canadian Pacific Railway Company had to concede to some extent these demands of the steamship lines or accept the alternative of closing the line pending the completion of its vessels, which will not be until March 1st, 1891. The road could not afford to retire from the business and leave a gap of six or seven months.

The English line of boats now running in connection with the road's line is inferior in passenger accommodations and runs at a disadvantage on that account.

Statistics kept on the subject show the traffic taken by the Canadian Pacific Railway Company has been nearly all diverted from the Suez canal. The general manager of the Canadian Pacific Railway Company testified before the commission that in his opinion the American lines have lost none of that traffic.

From May 30, 1887, to April 25, 1888, the Canadian Pacific carried Chinese and Japanese teas 18,584,353 pounds; nothing is credited to the Northern Pacific that year. From May 18th, 1888, to April 18th, 1889, 21,840,337 pounds were carried by the Canadian Pacific; nothing is credited to the Northern Pacific that year. From May 9th, 1889, to April 15, 1890, the Canadian Pacific carried 14,606,140 pounds, and during the period last mentioned the Northern Pacific carried in sailing vessels 7,618,018 pounds.

The Canadian Pacific Railway Company has not made any import rates via American seaports to interior points in America from Europe.

The special class upon which a rate of 13 cents per hundred pounds is made by the road covers a species of articles not produced in Canada, such as tin plate and such things; in other words, articles of imports.

The road has tariffs from Montreal west. These tariffs are issued at the opening of navigation every year. At the close of navigation the rates are somewhat higher, as in the summer the road has the River St. Lawrence and lake competition; the winter tariffs take effect about November. In summer they are changed for what are called summer tariffs. The road has never done any business in winter to United States points, but may do some hereafter. This refers to lines to Chicago and west of Chicago, to which the road has heretofore had no connection for that particular business. In the winter time the road is obliged to do that business through American connections, and they, being the initial lines, take the responsibility to the Government for adherence to the law.

The general manager of the Canadian Pacific Railway Company testified before the commission that he knew only one American line of steamers and that is the line plying between London and Australian points; that there is no such line in connection with the Canadian ports; and the seaport connections of the witness's road in the east are Montreal and St. John. The road has issued some, but not many, through bills of lading by way of American ports to points in the United States.

The road generally makes through rates from China and Japan

on tea to all points in the United States on a line drawn east and west through Chicago. Not much of this is south of Chicago. The road's operations are generally confined to Chicago and points north in the United States. The road makes through rates to New York city and all the way through to the Atlantic coast. The division between the road and its connecting lines is not the same to Chicago and New York, because the road's division and that of the steamers vary as the road has to pay out arbitraries to connecting lines.

The arrangements with steamship connections of this carrier as to its Asiatic traffic with steamship connections and rates are similar to those of the Southern Pacific Company.

Up to the time that the evidence showed that the steamship connections made demands for more liberal terms the road took out the arbitraries which accrued to connecting lines, and the balance of the through rate was divided equally between the Canadian
186 Pacific and the steamship companies. At that time, which was the fall of 1889, the road had to increase the proportion of the steamers and the road then gave the steamers greater powers as to rates. The arrangement between the railroad and the steamship lines is a part of the records of the company. But the general manager of the company testified that he did not know whether a copy of it had been filed with the auditor of the Interstate Commerce Commission. At the time when the railroad divided equally between itself and the steamships after taking out arbitraries for connecting lines there was a general understanding that the steamship companies in making rates should not go below 1½ cents a pound. If they did go below that rate they would have to stand it themselves.

One dollar and fifty cents a hundred or a cent and a half a pound, one-half going to the steamship lines and one-half to the railroad, if the distance were 3,000 miles, would be exactly a half a cent a ton a mile. The road does not carry any other class of freight at that rate from the Pacific coast. Tea generally bears the lowest rate.

There have not been more than two or three cases in the last three years where tea that came across the Pacific was taken off and stored at the road's Pacific terminal and the journey afterwards resumed. In such cases the road has agreed that, if the journey was resumed in thirty days, it would take the traffic at the through rate. This related only to Canadian teas. The tea to American ports must go direct. None of that has ever been held over at all.

While the route via Port Arthur to Chicago by water is a possible one it is altogether improbable. The frequency of handling would prevent the adoption of such a route and in addition thereto time would be against it. The loss resulting from such a route would be far greater than any advantage gained, and no tea has been shipped by the Canadian Pacific Railway Company by this route.

Tea is not, as is generally supposed, of great value, nor is it exceedingly difficult and risky to transport. The facts are the opposite of that.

Under the present arrangement between the road and the steamship lines, if the rate of $1.50 from Yokohama to eastern points was

reduced, the road would have to share the loss; under the former arrangement the steamship lines would have to bear the whole reduction. This latter arrangement was made some time in the latter part of October, 1889.

There is a general understanding among steamship companies that they will reduce rates to the extent necessary to fill their vessels and will accept rates that are offered by sailing vessels. While no tea has gone over the road's line by the route from Port Arthur to Chicago, the general manager of the Canadian Pacific Railway Company thinks there has been a little consignment of some other traffic, and mentions a small consignment of rice, but says the road had nothing to do with it. The road never uses the lake route in shipping merchandise from Asiatic points to lake ports in the United States. It has never used water transportation west of Montreal to the United States for American business.

The road in the summer, by way of Montreal, takes flour originating at Minneapolis or St. Paul to points in England; but in the winter time that business goes by way of New York and Boston. There are no through rates made to interior inland points in Great Britain within the knowledge of the general manager of the Canadian Pacific Railway Company and as he testified before the commission.

The ocean voyage from Yokohama to Vancouver is some six or seven hundred miles shorter than to other points. Vancouver is about eight hundred miles north of San Francisco. The advantage in summer by that route is about seven hundred and fifty miles and in winter about four or five hundred miles.

The rail rate from Vancouver to New York is sometimes one dollar per hundred pounds on tea and sometimes more and sometimes less than that rate. The highest rate ever known on tea was five cents a pound. The advent of the Canadian Pacific in connection with the steamer lines necessarily affected the business. The improved methods and new lines doing business were bound to cheapen the rates. The rates are uniform from Asiatic ports. The five-cent rate spoken of was before the Canadian Pacific was completed. The rail part of the through rate from Yokohama is the same without regard to the distance. The rate from Yokohama to Winnipeg, practically half way across the continent, would be just the same as from Yokohama to Montreal; and similarly the rates are just the same from Yokohama to Chicago as from Yokohama to New York by way of Chicago.

The general freight agent of the Pennsylvania Railroad Company testified in regard to this business in substance as follows:

The Pennsylvania Railroad Company makes through bills from foreign ports to interior American ports in connection with the Red Star line, the International line, the Inman line that sails from Liverpool to New York and Philadelphia, and through the lines of the Baltimore Storage and Lighterage Company through Baltimore. The lines are from London, Swansea, Glasgow, Leith, etc.

Since the act to regulate commerce went into effect the Pennsylvania Railroad Company has had a percentage arrangement with

all these steamship lines. The railroad took four miles for the ocean carriage and gave one mile for that. For example, the distance from Liverpool to Philadelphia is 3,680 miles. The road
187 calls that 920 miles for the ocean carriage. The road's distance from Philadelphia to Chicago is 833 miles, so the ocean line received $\frac{920}{1753}$ while the railroad received $\frac{833}{1753}$.

The basis for establishing that percentage was the business for five years. It was found that if during these five years these percentages had been used in lieu of giving the ocean lines just what they did receive the result would have been substantially the same. The actual operations for the five years preceding were taken and formulated into an agreement percentage. This arrangement in reference to percentages continued up to September 30, 1889. Since that date the road has charged its full inland rates upon this import traffic. The effect on the road's business has been, as the steamship agents state, that it has considerably fallen off. The steamship lines have gone on to protect their customers against outside competition, but the railroad has stated to them positively that it would charge the full inland rate on the traffic and has done so. The steamship lines are now standing the competition at the foreign port notwithstanding this, and the railroad has not participated in said foreign competition.

The railroad only knows the rates as they apply from the seaport on the other side. The ocean lines take care of the interior rates on the other side. The steamship lines can hold on in meeting this competition at foreign ports only for a certain length of time, while the road maintains its full inland rates. It is only a question of time when they will be forced out.

The steamship lines have never assented to the road's charging its full inland rates, and have been making demands on the road for a proper division of the through rate. If it were definitely determined that the road was not at liberty to charge less than the full inland rate, the result would be that it would effectually close every steamship line sailing to and from Baltimore and Philadelphia.

The Canadian competition has been the most effective and vigorous this road has had from any of the lines. It is a fact, however, that the Baltimore & Ohio took freight on these through rates in addition to the Canadian lines. Some of the other trunk line roads got some of this import traffic, but they all claim they charged the full inland rate on it.

While the steamship lines running to New Orleans must have some effect upon the road's rates to interior points, yet the road has never regarded that as serious competition. The rates to Chicago via New Orleans by the Harrison steamship lines are about the same as the Pennsylvania railroad's rate via Philadelphia, and that is competition with the Pennsylvania railroad. All the steamship lines running to New Orleans connecting with railroads for shipments to interior points are competitors of the Pennsylvania railroad. The Pennsylvania Railroad Company gets very little import traffic through the port of New York, and all the import traffic

that comes through the port of New York for other lines is in direct competition with the road's Philadelphia rate.

The Pennsylvania system has been carrying import traffic on through rates from foreign countries about seven or eight years, and those rates were not, when they originated, affected by any competition of the Canadian Pacific railway.

If the inland rates were maintained from all ports there would not be any difficulty in holding such inland rates and in the ports respectively holding their business.

The reduced through rates by the Pennsylvania railroad were made by the steamship agent in Liverpool to points as far west as the Missouri river, to points in the western country east of the Mississippi river in Ohio, Indiana, etc. This through rate was made by the steamship's agents in Liverpool, because, being on the ground, they were familiar with the competition and with the requirements of the traffic and the road authorized them to make these through rates in competition with these conditions.

About forty or fifty million tons of tin plate are brought into the country by the lines of the Pennsylvania Railroad Company through the three ports of New York, Philadelphia and Baltimore and carried annually to the interior.

The Pennsylvania railroad does not take this import traffic on the steamer classification, but takes it on rates per hundred pounds. The road has a classification—the regular trunk-line classification, the official classification. Pittsburgh, Erie and Harrisburg were not regarded as competitive points and the authority given the steamship agents to make rates to these points was not entirely called for by the competition with the Canadian route. Through the central and trunk-line territory there is one uniform classification and that is the classification upon which the Pennsylvania railroad has been uniformly carrying.

The Pennsylvania railroad takes traffic from other lines than the ones which it has been heretofore operating with on the percentage basis. It gets freight from all lines in New York. Long before the enactment of the interstate commerce law the great difficulty in the experience of this road in getting steamship lines to import freight to Baltimore was that these steamship lines were sailing in connection with Canadian lines—the Grand Trunk roads—with which they could make arrangements for a reduction in the import rates on the business they gave to the Canadian roads. When the rates have been cut on import business it has been the experience of this company that the cuts have been inaugurated by the Canadian lines as a rule, as evidenced by the bills of lading under which the Old Dominion line and other lines are taking freight by the Canadian railroads as well as general statements of steamship agents on the other side. The majority of the reduced rates have always been inaugurated by the Canadian lines for the last three or four years. The same condition of things pertains also to export business generally.

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Among the bills of lading set out in the complaint is one dated June 17, 1889, on tin plate from Liverpool to Chicago, with a through

rate of 24 cents, and the division would be about 12 for the rail and 12 for the ocean. The regular inland rate at that time was 28 cents from Philadelphia. Eleven cents from Philadelphia is a little less than three mills per ton per mile, and $33 per car. There is no money in carrying freight at less than three mills per ton per mile. No traffic, however, which the road carries can be considered alone by itself. Taking this traffic alone and by itself $2.20 per ton certainly did not pay the road, but furnished loading for empty cars. Separately by itself that rate hardly paid the cost of transportation. During the time that the road carried import traffic at the reduced inland rate the rule was that so far as the traffic itself was concerned, and not considering it in relation to other things, it was carried at less than the cost of transportation.

The general freight agent of the Pennsylvania Railroad Company testified that in his opinion a fair fixed relation can be maintained between the inland tariff rate and the inland proportion of the through rate if the agents of the steamship lines in Liverpool would do substantially what the railroads had to do in New York, namely, get together and agree upon what are fair rates considering the competition and every element that enters into the making of rates. But if the agents in Liverpool should not do this, but should remain engaged in active strife and competition by all the different shippers to get traffic for the interior lines of the United States to interior points, the rule would be that all lines running from the seaports to the interior would have to carry at low rates, scarcely paying, as above stated, the cost of transportation. In making these through rates, originally there was a difference between carloads and less than car-loads. The difference was the same as that made on the inland traffic and about approximately in the same proportion.

On these through rates which were in force prior to September, 1889, the ship did not have the option between space and weight on the Pennsylvania line. The Pennsylvania railroad shipped entirely by weight. The steamship may take the traffic at measurement rates or weight, but when it reaches the Pennsylvania railroad it is invariably reduced to cents per hundred.

The through import rates, in order to give information to shippers as well as to the general public interested in them, should be posted where the ship loads, say at Liverpool, for instance, for Liverpool traffic.

The general freight agent of the Pennsylvania railroad further testified before the commission that in his opinion the basis on which this business was conducted by the Pennsylvania railroad with the steamship lines was reasonable as between the shippers. He knew of no more equitable or reasonable adjustment as between the ocean and land carriers than that stipulated in the agreements on file with the commission, and if this agreement were in force as to Atlantic ports there would be no difficulty in maintaining the rule of the fourth section of the interstate commerce law, the long-and-short-haul clause. In other words, the through rate from the foreign port to the interior points of the United States could

always be kept higher than to the interior shorter haul. The Liverpool rate could be kept higher than the rates from Philadelphia which is as it is now under the long-and-short-haul clause between Philadelphia and all interior points in the West.

Freight is taken from Savannah, Georgia, by boat to Baltimore for the West, say to Chicago. The Pennsylvania railroad does not charge on that business from Baltimore to Chicago the same that it charges locally from Baltimore.

Since the order made by the commission of March 23, 1889, the steamship connections of the Grand Trunk railway have reduced the rate on imported traffic.

The same witness last mentioned gave this illustration of his view in regard to this through rate: Suppose we had a shipment from Trenton to Chicago at 30 cents per hundred pounds for queen's ware; say the ocean rate from the other side is 20 cents—that would make the through rate 50 cents as against 30 cents from Trenton. Now if the railroad company and the steamship lines should make a rate of 45 cents through, it would not be a discrimination as against Trenton under these circumstances.

The practice of the Baltimore & Ohio Railroad Company, so far as import traffic from Europe is concerned, has been to bring enough heavy traffic in the steamers from Europe to get them into Baltimore for export business from Baltimore. The road, however, takes import business from New York and also from Philadelphia. The road gets 95 per cent. of its import business via Baltimore, and connects with five or six regular lines of steamers plying to that port, namely, the Allan line from Liverpool, the Johnston from Liverpool, the Johnston line from London, the Furness lines
189 from Antwerp, and what is known as the Dreassle line from Rotterdam and Amsterdam.

The import freight carried by the road is very heavy coarse goods from Liverpool, London and Glasgow. It is principally cement, crockery, earth paints and chemicals, and some iron ore. From the continent there is considerable of what is called "measurement goods," that is, high-class goods. From 80 to 85 per cent. of this freight comes on through bills of lading. The arrangement the road has made with the steamship lines for the division of the through rate is as follows: The road demands an arbitrary on the business, as a rule, that will not give it less than 15 cents per hundred pounds to Chicago. It is at times prorated with the steamships, but the best prorate that it has ever given to the vessels is on the basis of 60 per cent. for the inland and forty per cent. for the ocean rate. The competition which this road meets, especially on Liverpool business—which is the great point of competition in Europe—to interior points is by the Canadian lines, by the Erie canal and by the Mississippi river. The general traffic manager of the Baltimore & Ohio Railroad Company testified before the commission that in his opinion the rate by canal and lake from New York to Chicago given on this heavy traffic is the yard stick by which all rates are measured and must be measured, between the seaboard and Chicago. The route the road comes in competition with at St. Louis and

Kansas City is the route made up the Mississippi river by what is known as the barge line. The Canadian lines are the factors in making rates out of Liverpool. They have the largest number of competing lines.

From the Treasury Department Reports of Commerce and Navigation of the United States it appears that all the imports amount to $745,000,000, and the exports, $743,000,000. The tonnage cannot be arrived at unless by going through and compiling it on every article, which would be an interminable job. At Baltimore the exports are very much heavier than the imports—probably quadruple. In money Baltimore imports are about $15,000,000 worth; her exports are about $51,000,000 worth. New York imports are 63 per cent. of all the traffic that comes into the United States, and its exports are only about 43 per cent. In percentage, based on dollars, Baltimore brings in imports about 2 per cent.; its exports are about 8 per cent. of the total of the United States.

New York is above every other point for shipping. In the first place the balance of exchange, the affiliations of the owners of vessels with branch houses in New York, the rapidity with which they can obtain a cargo and the fact that so much traffic is bound to go to New York—this all makes New York the prime point for vessel tonnage from foreign ports. A vessel comes into New York with a lot of traffic to go through to Chicago; the canal-boat comes alongside the vessel and takes in that traffic; then it goes to Buffalo and discharges into an Erie or New York Central steamship owned and controlled by one of those lines, and it goes through to Canada beating the all-rail rate or the lake and rail anywhere from one to three dollars per ton according to the sworn testimony of the general traffic manager of the Baltimore & Ohio railroad.

The same witness testified that out of an invoice of three or four hundred cases of imported goods to New York only 25 or 30 cases were carried on to Chicago; the rest were jobbed in New York. The importers always want the option of the New York market, and there is hardly any inducement that can be offered them that can carry dry goods through any other port than the port of New York.

The Baltimore & Ohio Railroad Company as a general rule makes divisions as above stated with the steamship lines on the basis of 60 per cent. for the road and 40 per cent. for the steamer. But if that division carried the road below what it thought was a fair minimum rate for the road and it can bring the steamship down lower it would not prorate.

The rates of the Baltimore & Ohio railroad are about the same with all steamer lines, but there are regular lines of steamers that the road confers with and works with closer than outsiders. Those regular lines are the Bremen line, the Allan line and the Johnston line. They are all authorized to make through rates and give through bills of lading, provided they agree to the minimum charged by the road. If the road were required to charge the full inland rate on everything coming to the port of Baltimore it would simply have to go out of the import business.

The most interior points to which the Baltimore & Ohio railroad makes through rates are St. Louis and points between St. Louis and Chicago, though very little to any of the latter points. The export and import business at Missouri River points is not a subject of competition between the ports of Baltimore and New Orleans. That business goes to New Orleans whenever the river wants it. It takes it upon a set of barges that brings that traffic up the river at an exceedingly low rate. The steamers take goods frequently on what they call "measurement," because they can make more money out of it than by taking by weight. But the inland proportion of the road is calculated on the weight.

The road gets on through rates on imported goods from Baltimore to Chicago 15 cents per hundred pounds, and where the road gets this 15 cents the through rate runs from 20 to 24 cents per hundred pounds.

The relative distances to New York, Philadelphia, Baltimore and New Orleans from French, German and English ports are as follows: Boston has the shortest line; there is very little difference between New York and Philadelphia; Baltimore is about a day or a day and a half longer; and New Orleans is the longest route of all.

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The general traffic manager of the Baltimore & Ohio Railroad Company further testified before the commission that since the interstate commerce law went into effect the import traffic through the different ports has been maintained as he thinks with better through rates from Europe than before. The rate from Liverpool to Chicago is certainly as high if not higher than before the interstate commerce law was enacted. Since said law went into effect Baltimore has hardly held her own as to imports; certainly they have not increased; but she may have increased in exports. The regular inland tariff rates from New York, Baltimore and Philadelphia to interior centers like Chicago are at all times on the lower classes of goods as low as they can be carried at a profit; and take the average of the medium and high class goods the same is the case. On that class of goods on which the Baltimore & Ohio railroad gets 15 cents out of the through rate to Chicago, the inland tariff rate is 22 cents. The through rates are made to Chicago, St. Louis and interior points, and, if necessary, to intermediate points. All the traffic the road handles on through bills of lading is in carload lots. The road seldom has a through bill of lading for less than fifty tons. Usually the joint tariffs between the road and the steamship lines are made verbally from day to day. There are no lists filed with the commission.

Cincinnati is the southern outlet of the Baltimore & Ohio railroad and this road does no work on a through bill of lading south of the Ohio river; it has traffic south of that river, but gives a bill of lading only to Cincinnati. The witness knows no manufacturers who complain of being discriminated against by this through bill of lading. As a rule the road brings mostly raw material, which really goes to the manufacturers.

The Chicago & Grand Trunk railway is an affiliated line practi-

cally controlled by the Grand Trunk Railway Company. It has a separate organization, separate capital and separate management, but is still under the same control, officered by the same persons, except the president and vice-president.

The Grand Trunk Railway of Canada extends to Portland in Maine as well as to Montreal in Canada. Portland is entirely dependent upon the Grand Trunk for its ocean steamship service. It has no other, and that only during the winter season. Montreal business opens in the summer season from May to November.

The Grand Trunk Railway of Canada has had relations with Messrs. Allan since 1857 and they have been based upon the percentage principle. The road takes the ups and downs upon that principle and experience has shown it to be a fair method of doing the business. But when the interstate commerce law came into operation the road ceased to apply the percentage principle in respect to United States traffic, and after the last ruling of the Interstate Commerce Commission made it necessary to charge the same rate from the seaport upon European as upon all other traffic, the road issued a tariff which is applicable to everybody. The latest tariff is that of May, 1890, and is called No. D. G. 13 interstate tariff, and it took effect May 1st, 1890. In 1889 the road commenced a tariff based upon 22 cents, sixth class, without any special commodity tariff attached to it. The ocean steamship connections stated they could get no traffic on that basis. The second tariff was on the basis of 20 cents per hundred pounds. Still the road was told no traffic could be obtained. The road then came down to a 13-cent tariff and that is the present basis for sixth class—for the coarser kinds of goods. Special commodity rates are made upon both domestic and import traffic to enable our steamers to carry a portion of the traffic.

The Grand Trunk Railway of Canada is a member of the Trunk Line Association, and there is a uniform classification of the Trunk Line Association and the Central Traffic Association, and these special commodity classifications in the tariff of May, 1890, are excepted articles from said classification. It appears that these commodity tariffs have never been submitted to the commissioner of the Trunk Line Association for his action.

The general freight traffic manager of the Grand Trunk Railway of Canada testified before the commission that the articles in said special commodity classification are substantially sixth-class articles of the Trunk Line classification, and if the principles of the classification were adhered to it would necessitate the introduction of all articles of substantially similar character. On articles embraced in said commodity tariff shipments have been mostly through. To a comparatively small extent the shipments have been made through Portland and Montreal to United States points. The steamship connections of the Grand Trunk Railway Company of Canada carried traffic mainly for Canadian points, although Canadian traffic comes through American ports to a large extent. The Grand Trunk Railway Company of Canada carries some American traffic. During the last season about 2,500 tons of tin plate from Portland were

carried by it. There are thirty points in the United States running from Chicago to St. Louis, Louisville, Indianapolis and Pitts-
191 burgh to which the reduced commodity tariff applies. On articles outside of the commodity tariff the rates are applied on a basis of 65 cents a hundred for first class. Thirteen cents on sixth class is the rate the road has now got down to under this commodity tariff. Before that rate, the rate on sixth class was 22 cents.

The Conclusions and Opinion of the Commission.

The language of section 1 of the act to regulate commerce provides for a specific regulation of the subject involved in this controversy that cannot be more clearly and intelligibly stated than by quoting the section itself. That section is as follows:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

So much of that portion of this section above quoted as refers to the subject of foreign commerce brought through a port of entry in the United States or through a port of entry in a foreign country adjacent to the United States, in either event destined to a place in the United States upon through bills of lading from the foreign port of shipment, to the place of destination in the United States, is perhaps more readily comprehended if separately stated:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, * * * or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

In opening the debate on the 14th day of April, 1886, and explaining the bill for the information of the United States Senate, the

chairman of the Senate select committee, in discussing this subject, said:

"While the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, such as shipments between the United States and adjacent countries by railroad, and the transportation by railroad of shipments between points in the United States and ports of transshipment or of entry, when such shipments are destined to or received from a foreign country on through bills of lading. To avoid any uncertainty as to the meaning of these provisions in regard to what may be at the same time in some instances State and foreign commerce, it is expressly provided that the bill shall not apply to the transportation of property wholly within one State and not destined to or received from a foreign country."

As bearing upon the construction of these provisions of the first section of the act to regulate commerce relating to foreign commerce, it is significant that after this explanation of this section, thus made by the chairman of the Senate select committee, in all the subsequent debates that followed, there seems to have been no difference of opinion in regard to it in either house of Congress, and it was enacted literally as reported by the Senate select committee. Congress was here in clear, intelligible and terse language defining the field of transportation to be regulated as well as the carriers who were to be supervised in the administration of the statute. That part of this field relating to foreign commerce was the transportation of this commerce between the port of entry and place of destination upon the through bill of lading, such place of destination being in the United States, and such port of entry being either in the United States or in a foreign country adjacent to the United States.

Congress did not undertake to regulate its transportation on the high seas, nor at the foreign ports of shipment, nor in the foreign country adjacent to the United States. But in the one instance, as soon as that commerce is brought through a port of entry in the United States upon a through bill of lading destined to a place in the United States and is taken into the United States by a rail carrier or by a carrier part rail and part water, for transportation to its place of destination, it then comes within the jurisdiction of the act to regulate commerce. And, in the other instance, when that commerce upon a through bill of lading destined to a place within the United States, comes through a port of entry in an adjacent foreign country and is brought within the territorial jurisdiction of the United States, it then becomes subject to the regulation
192 of the act to regulate commerce. Several reasons are obviously manifest why this regulation was so provided by Congress in each of these instances. In the first place, it is the purpose of the act that the carriage of such foreign freight from a port of entry in the United States to a place within the United States upon

a through bill of lading shall not be left open and free from regulation, so that it may be given a preference in transportation over other traffic originating in the United States, and destined for carriage to a place within the United States, or that one shipper or dealer may have a preference in rates or facilities in the carriage of such foreign merchandise over other dealers, in the carriage of their freight originating in the United States and carried to a place within the United States. In the next place, it is a purpose of the statute, equally clear as to the other class of foreign freight, that carriers bringing it from a port of entry in an adjacent foreign country to a place within the United States shall not be permitted to violate the provisions of the act to regulate commerce as against consignees, dealers and localities in the United States, nor as against competing American carriers engaged in like business of transporting freight from a port of entry in the United States to a place of destination in the United States upon a through bill of lading. Other reasons might be named, but these are deemed sufficient for the purposes of this report and opinion. But in every such case the jurisdiction conferred by the statute, whether in the one or the other of these instances, legitimately extends the inquiry and scope of investigation to every device, way or means by which any such violation is attempted or done.

The power of Congress to enact such legislation has always been deemed plenary, under the grant contained in section 8 of article I of the Constitution of the United States, and requires no discussion now. Between the parties to this contention there is no difference of opinion that the importation of traffic on through bills of lading by continuous carriage—ship and rail—from the ports of Europe or other foreign countries to points within the United States is a transportation the regulation of which is provided for by the act to regulate commerce. The differences between them indicated in this contention relate to the methods of such regulation, the extent of that regulation and the operation of the statute in regard to it.

There are various features of this business as done that place it upon very peculiar grounds. It appears that the business itself has been done by the carriers engaged in it for a period of about eight years. The principal articles imported are teas, tin plate, soda caustic, wines and liquors, and a list of general merchandise which in itself is not large. The business itself is not a very large one, though it has increased considerably during the period since it commenced, and is of sufficient amount to make it an object to American rail carriers to obtain the revenue from it if they can.

On the 23d of March, 1889, the commission, by a general order of that date, issued to the carriers engaged in interstate commerce and subject to the provisions of the statute, which, amongst other things, directed that—

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff covering other freights."

The statement of the pleadings and the material facts found in

the present proceeding show by what carriers this order has been obeyed and by which of them it has not been obeyed, and upon what grounds these last justify their action in this respect. A repetition of the names of these carriers in each instance is unnecessary, as this has been shown in a foregoing part of this report. That general order was not made upon any contention of parties, in which the commission had the benefit of all the evidence now adduced in this controversy, or of the light thrown upon the subject by the discussions of able and experienced counsel, but the commission, from serious consideration then and before that time given to this subject, was informed that there were a few of the interstate carriers who did this kind of business, though upon a very small scale compared to their whole business. That order also embraced other important subjects besides this of import rates. After that order was made and published by the commission for the information and guidance of the carriers, shippers and dealers, it was supposed by the commission that if any of the carriers found that the order was one which injured them in that business, or that it operated to the detriment of importers, or that, on the other hand, it was not observed by the carriers, to the injury of domestic producers and dealers, in either event complaint would be made to the commission by the one or the other of these several classes for a modification of the order. But no such complaint has been made until that which is presented in this proceeding.

In consequence of the constant and frequent fluctuation of ocean rates and the fact that shipments of this kind are neither large nor regular from foreign countries, except it be teas from Japan and China, and tin plate, it has been found to be the experience of carriers engaged in it that joint tariffs between the steamships and the rail carriers, framed, published and maintained as required by the provisions of the act to regulate commerce, have, up to this
193 time, been found to be impossible in the nature of things.

The port of entry at which the nearest approach in some respects to a tariff meeting the requirements of the act to regulate commerce has been in force, has been at New Orleans between the rail line of the Southern Pacific Company and its steamship connections. We refer here of course to those carriers not complying with the act. But even in this instance, the general traffic manager of that company candidly admitted in testifying before the commission that if it was discovered that any important change was rendered necessary in the joint tariff of that company and its steamship connections in regard to the rates for freight upon any articles, that the change was made at once by the general freight agent of his company at New Orleans and the agent of the steamship company at that port and put into immediate effect without giving the notice required by the statute, and that they could not do the business any other way. The Southern Pacific Company filed the joint tariffs of that company and its steamship connections engaged in this carrying trade with the Interstate Commerce Commission, but changes in these joint tariffs were made in the manner above indicated and then reported to the commission. Besides,

greatly lower rates are charged by this company on foreign merchandise from the port of entry to the point of destination in the United States than upon like traffic under its inland tariff between these same points. In the case of the Louisville, New Orleans & Texas Railway Company the tariffs are not made up except upon each consignment and not reported to the commission until after the consignment has become known to the railroad company. Joint tariffs of other railway companies engaged in this business, if such exist, have not been filed with the commission as provided by the statute. The excuse made for this has been, as already stated, the impracticability of making and maintaining and publishing joint tariffs as is required by the statute in the publication, maintenance and filing of these with the commission. It seems that the method adopted by rail carriers engaged in this business has been, with the exception of the Southern Pacific Company, that the rates are made absolutely by the agents of the steamship company in foreign countries and the railway carriers accept them, whatever they may be. The entire transportation rate between vessel and rail carriers is divided between them upon certain agreed proportions in all this business.

One of the most important features of the act to regulate commerce is the provisions of that statute for the publicity of rates and the maintenance of them as required by it. In the case of imported traffic it appears that these features of the statute would, as to the business shown to be done in this case, be in many vital respects impossible of application. A place at which it would seem that joint rates made under the requirements of the act to regulate commerce should always be published for the information of shippers, would be at the place of origin of the freight, in order that shippers might know what the rates were. It appears from the evidence in this case that this cannot be done in the foreign ports on account of the rapid fluctuation of rates and that it would be destructive of the competition which prevails in making them at those ports. And, besides, there is no law that requires it at such foreign ports.

The provisions of the statute relating to the carriage of passengers or freight over continuous lines or routes operated by more than one common carrier require that copies of joint tariffs of rates or fares, or charges for such continuous routes, shall be filed with the commission. The commission has no power to suspend the provisions of the statute relating to this or to the manner in which advances and reductions shall be made in them and reported to the commission. In these respects the statute is inexorable. In section 6, amongst other things, it is provided that—

"Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions

of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

And further that—

"No advance shall be made in joint rates, fares and charges shown upon joint tariffs, except after ten days' notice to the commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased
194 rates, fares or charges will go into effect. No reduction shall be made in joint rates, fares and charges, except after three days' notice, to be given to the commission as is above provided in the case of an advance of joint rates. The commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs."

And in addition to this, that—

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon, than is specified in the schedule filed with the commission in force at the time."

And again that—

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and, if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also

apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act."

The power with which the commission is clothed by this section "from time to time to prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published," was first exercised by the commission in a general order directed to the carriers dated June 21st, 1887, as follows:

"Joint tariffs of rates, fares or charges, established by two or more common carriers for the transportation of passengers or freight passing over continuous lines or routes, copies of which are required by the sixth section of the 'Act to regulate commerce' to be filed with the commission, shall be made public so far as the same relate to business between points which are connected by the line of any single common carrier required by the first paragraph of said section to make public schedules of its rates, fares and charges. Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary 'pica,' copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid."

And subsequently, as to the publication of such joint tariffs and of advances and reductions in such joint tariffs, the commission made an order as recited in its order of March 23, 1889, to the effect that—

"All advances and reductions in joint rates, fares and charges shown upon joint tariffs established by common carriers subject to the provisions of the act to regulate commerce shall be made public.

"Every such advance or reduction shall be so published by plainly printing the same in large type, two copies of which shall be posted for the use of the public in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation under such schedules, in such form that they shall be accessible to the public and can be conveniently inspected. Such schedules shall be so posted ten days prior to the taking effect of any such advance and three days prior to the taking effect of any such reduction in joint rates, fares and charges."

The publication of such inland joint tariffs for the transportation

of such foreign merchandise under the statute and of advances and reductions should be made at the port of entry and also at the point of destination of freight in the United States by posting the same in a public place at the depot of the carrier where the freight is received in the port of entry and where it is delivered at the place of destination in the United States.

In the case of all the various articles that are the subject of import, the basis of division between the rail and water carriers, which will be seen in some respects to vary between the different carriers, will be found stated in the preceding part of this report and opinion and it is not necessary nor material to repeat them here.

In every instance of those carriers not complying with the order of the commission of March 23d, 1889, it will be observed that
195 the inland proportion of the through rate charged by the rail carrier on this imported traffic is largely less than the rate charged by it on other freight carried by it under the inland tariff over the same line from the port of entry to the place of destination in the United States. The rail carriers defend this on the ground that the rates are made in foreign countries under circumstances and conditions of competition that are wholly dissimilar to those surrounding the rates upon articles of domestic manufacture in the United States; and further, that in this case, as in the case of other through rates upon property, if transported from one place in the United States to another, the percentages of the through rates between points along the line may well be justly lower than the local rates between the same points, and therefore that this principle should govern as to the inland or rail proportion of the through transportation rate on imported traffic between the port of entry and the place to which the freight is carried by the rail carrier in the United States. But the statute has made the two cases clearly distinguishable.

The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail and partly by water or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of tariffs of rates and charges, but has left it to the unrestrained competition of ocean carriers and all the circumstances and conditions surrounding it. These circumstances and conditions

are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction. To hold otherwise would be for the commission to create exceptions to the operation of the statute not found in the statute; and no other power but Congress can create such exceptions in the exercise of legislative authority.

In the one case the freight is transported from a point of origin in the United States to a destination within the United States, or port of transhipment, if it be intended for export, upon open published rates, which must be reasonable and just, not unjustly preferential to one kind of traffic over another, and relatively fair and just as between localities; and the circumstances and conditions surrounding and involved in the transportation of the freight are in a very high degree material. In the other case the freight originates in a foreign country, its carriage is commenced from a foreign port, it is carried upon rates that are not open and published, but are secret, and in making these rates it is wholly immaterial to the parties making them whether they are reasonable and just or not, so they take the freight and beat a rival, and it is equally immaterial to them whether they unjustly discriminate against surrounding or rival localities in such foreign country or not. Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination covering other like kind of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preference must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition under the operation of the act to

regulate commerce which entitles it to lower rates or any
196 other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line.

The term "a like kind of traffic," as found in section 2 of the act to regulate commerce, and as used in this report and opinion, does not mean traffic that is identical, but it means traffic that is of "a like kind" with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference. The words "service rendered," and "a like and contemporaneous service," and "under substantially similar circumstances and conditions," as these occur in that section, together with the method of classification of freights as it is done by the railroads, which is recognized in the sixth section of the statute, all point to this construction. Each of these are controlling and important words of the statute used in immediate connection with the subject of transportation and cannot be overlooked in arriving at the meaning of the statute.

The first clause of the 3d section of the act to regulate commerce also contains provisions bearing with more or less force upon the several questions involved in this proceeding. Its language is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers and localities, for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute. Such a deprivation would be so obviously unjust as to shock the general sense of justice of all the people of the country except the few who would receive the immediate and direct benefit of it.

On the 10th of August, 1888, the Parliament of Great Britain enacted a statute known as 51 and 52 Victoria, chapter 25, entitled

"An act for the better regulation of railway and canal traffic, and for other purposes," in which, amongst other things, it was provided "that no railway company shall make, nor shall the court or the commissioners sanction, any difference in the tolls, rates or charges made for, or any difference in the treatment of, home and foreign merchandise in respect to the same or similar service." The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates or charges for, or any difference in the treatment of, home and foreign merchandise in respect to the same or similar service rendered in the transportation when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly engrafted upon the face of the act to regulate commerce before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges and treatment for similar services rendered.

The business complained of in this proceeding is done in the shipment of foreign merchandise from foreign ports through ports of entry of the United States, or through ports of entry in a foreign country adjacent to the United States, to points of destination in the United States, upon through bills of lading; and hence, in our construction of the statute and discussion of the questions involved, we have endeavored to keep prominent the facts shown by the evidence, and in this way may have appeared to lay much stress upon the term "through bills of lading." But under our view of the statute, the result would not be different if this business was done otherwise than upon through bills of lading.

There is a feature of this case relating to the original respondents, The Pennsylvania Railroad Company, The Pittsburgh, Fort Wayne & Chicago Railway Company and The Pittsburgh, Cincinnati & St. Louis Railway Company, upon the facts, that is different from that of the other respondents and deserves to be separately noticed.

197 The contracts of the Pennsylvania Railroad Company and the International Navigation Company referred to in the complaint have been on file in the office of the Interstate Commerce Commission ever since the 14th day of April, 1887, and were so filed by the Pennsylvania Railroad Company. These were produced at the hearing of this proceeding and were put in evidence. The first of these is dated October 10, 1884, to continue in effect until January 1, 1891, after which it may be terminated upon one year's previous written notice by either party to the other of a desire that it shall end, at the expiration of which notice it shall cease and determine. The second of these is dated January 13, 1886, and is an amendment of the 3d and 9th sections of the original, and provides

that it shall continue until July 1, 1891. The substance of this original and amended contract provides that the railroad company and the steamship company agree to "co-operate each with the other to secure and encourage joint through traffic by issuing, at competitive rates, through bills of lading and through passenger tickets between Philadelphia and Liverpool and between New York and Liverpool and between Philadelphia or New York and Antwerp, and by giving due publicity to said connection and facilities in their cards, hand-bills and advertisements, and each party shall in good faith exert itself through its agents to secure and promote such traffic. On all joint through freight and passenger traffic the parties hereto agree that they will charge and accept as low rates as they currently charge and obtain on like business between similar points, after deducting all rebates and allowances of every kind." It then provides for the establishment and use of piers and for the loading, unloading and shifting of cars, and the prices that each is to receive for the services rendered in loading and unloading freight interchanged between them.

The 5th clause provides for what the railroad company shall receive for the transportation of freight and passengers transported by it to the steamship company or received by it from the steamship company, and is in these words:

"The railroad company agrees that in determining the railroad rates to and from Philadelphia which it shall receive on all interchanged freight traffic, they shall not exceed the aforesaid lowest rates currently charged and obtained to and from New York, after deducting from said lowest New York rates the current public agreed difference between New York and Philadelphia rates, which difference it is agreed under this contract shall not be rated less than the present difference of two cents per hundred pounds. In determining the rates on interchanged passenger business to and from Philadelphia which the railroad company shall receive it is agreed they shall not exceed eighty per centum of the lowest rates currently received by the railroad company as its *pro rata* between Pittsburg and New York on like business to and from New York."

The remaining provisions of the contract provide for the establishment of agencies to solicit business; how it shall be determined which is liable for loss or injury to property or passengers, the railroad company or the steamship company; that joint bills of lading shall be issued, mutually approved by the parties, and statements and particulars of joint traffic shall be submitted to each other, and the accounts thereof settled by the agents of the parties, and the balances found to be due by the parties respectively to each other shall be paid monthly to the party entitled to receive the same; and that in case of doubt, question, difference, cause of suit, all such matters shall be settled by arbitration in the manner provided by the contract.

At the date of the contract the Pennsylvania Railroad Company had a line from Pittsburgh to Philadelphia; and hence the allusion in the 5th section of the contract to rates currently received by the

railroad company as its *pro rata* between Pittsburgh and New York on like business to and from New York.

It was so obvious that this contract did not establish the matters involved in this complaint that it was not even alluded to in the briefs or arguments of any or either of the counsel of any of the complainants, or in the briefs and arguments of any of the counsel for the respondents, between some of which respondents and the Pennsylvania Railroad Company considerable feeling was evinced in the course of the hearing. This contract provided for no aggregate through rate; it provided for no division of such aggregate through rate stating what percentage should be received by the railroad company and what percentage should be received by the steamship company. And as the through bills, copies of which were set out in the complaint, were all issued during the year 1888 and prior to the order of this commission of March 23, 1889, and upon freights brought by the American line of steamships to Philadelphia, the course was then taken to prove by the general freight agent of the Pennsylvania Railroad Company what the joint through rates had been and the manner in which these had been divided between the Pennsylvania Railroad Company and the other lines composing its system and the steamship companies, and it was proven by his evidence that a practice had existed between them of making these through rates upon percentage divisions with steamship lines generally at New York and Philadelphia by which the railroad company carried and imported freight over its own lines from the port of entry to destination at largely less than its inland rates upon similar freight originating at Philadelphia or other ports of entry, but that this practice had been abandoned on the 30th day of September, 1889, according to previous notice given by him to
198 that effect in December, 1888, and that since the 30th of September, 1889, all import traffic had been carried by the company at the same rates on its inland tariff for all other similar traffic from ports of entry to place of destination.

After all this, when the counsel for the New York board of trade and transportation in his brief and argument, in compliance with a rule of practice of the Interstate Commerce Commission, submitted to the commission "the findings of fact" which he proposed the commission should find in this case, and referring to the Pennsylvania Railroad Company, the Pittsburgh, Fort Wayne & Chicago Railway Company and the Pittsburgh, Cincinnati & St. Louis Railway Company, he used this language; "The three latter roads ceased the practice on October 15, 1889, as they allege, and there is no proof to the contrary." It thus appeared in the proof without controversy that several months before this proceeding commenced these three defendants had abandoned this practice.

As a matter of fact it has been the well-known and established practice of this commission in administering the provisions of the act to regulate commerce, from the time of its organization, that, in cases where a carrier has abandoned a practice deemed unlawful or questionable prior to the commencement of proceedings against it, or at any time even before the hearing of such proceedings when

commenced, and is obeying the law as construed by the commission, the commission will make no order against it to cease a practice which it had already abandoned, because such order would be vain and useless and the statute does not require it. In changing long-established methods of business, existing prior to the enactment of the statute, in order to comply with its provisions on the part of carriers and their agents, it was seen by the commission that things of this kind would occasionally occur, and the purpose of the commission was to have the carriers in the course of administration conform their methods to the requirements of the statute with as little delay as possible, and work in harmony with its provisions for the welfare of the public as well as for their own good. See The Manufacturers' and Jobbers' Union of Mankato *v.* The Minneapolis & St. Louis Railway Company and others, 1 Inters. Com. Rep., 630, 1 I. C. C. Rep., 227; The Lincoln Board of Trade *v.* The Burlington & Missouri River Railroad Company in Nebraska and others, 2 Inters. Com. Rep., 95, 2 I. C. C. Rep., 147; Second Annual Report of the Interstate Commerce Commission; The Pennsylvania Company *v.* The Louisville, New Albany & Chicago Railway Company and others, 2 Inters. Com. Rep., 603, 3 I. C. C. Rep., 223; The Lincoln Board of Trade *v.* The Union Pacific Railway Company, 2 Inters. Com. Rep., 101, 3 I. C. C. Rep., 221; The American Wire Nail Company *v.* Queen and Crescent Fast Freight Line, 2 Inters. Com. Rep., 604, 3 I. C. C. Rep., 224; Rawson *v.* The Newport News & Mississippi Valley Company, 2 Inters. Com. Rep., 626, 3 I. C. C. Rep., 266; Holbrook *et al. v.* The St. Paul, Minneapolis & Manitoba R. R. Co., 1 Inters. Com. Rep., 323, 1 I. C. C. Rep., 103.

In such a case it has always been presumed by the commission that the abandonment of the practice by the carrier was done in good faith and would be so considered until something to the contrary occurred. So well known were these rules of the commission by the learned counsel for the complainants and respondents that, after the evidence was all in from which it appeared, amongst other things, that the Pennsylvania Railroad Company had abandoned this practice on the 30th of September, 1889, according to previous notice long given, and since that time had been complying with the order of the commission of March 23, 1889, none of them insisted in any of their briefs and arguments that any order should now be made against it.

The method by which the Grand Trunk Railway Company of Canada complied with the order of the commission above referred to of date March 23, 1889, was to select a few articles, all of which were imports, and to put them into what was called a "commodity class" at largely reduced rates, for example, from Montreal, Canada, and Portland, Maine, to Chicago, Illinois, and a large number of other United States points, over their lines, and from Chicago and the same other United States points to Montreal and Portland. The following table will show a list of these articles, the classifications from which they were taken, the rates they bore in each of these classifications and the rates they now bear in the commodity class;

To Chicago.	Official class'n class.	From Montreal.		From Portland.	
Articles.		Class rate.	Commodity class rate.	Class rate.	Commodity class rate.
Bleach	6	22	13	22	13
Blooms	6	22	13	22	13
Billets	6	22	13	22	13
Brick	6	22	13	22	13
Cement	6	22	13	22	13
Clay	6	22	13	22	13
Galvanized iron	5	26	13	26	13
Granite, Sandstone	5	26	13	26	13
Pig-iron, Scrap iron or steel, Speigle iron	6	22	13	22	13
Puddled bars	6	22	13	22	13
Soda (ash and caustic)	6	22	13	22	13
Soda, silicate	6	22	13	22	13
Soda, bicarbonate	4	31	13	31	13
Tin plate	5	26	13	26	13
Salt	6	22	13	22	13
Wire rods	5	26	13	26	13
Nail rods	5	26	13	26	13
Sheet lead	4	31	13	31	13
Whiting	6	22	13	22	13

199 The above table is made from the commodity tariff of the Grand Trunk Railway Company of Canada from Portland, taking effect November 25, 1889, and continuing in effect until May 26, 1890; and from tariff of the same company from Montreal, taking effect May 1st, 1890, and continuing in effect until November 25th, 1890.

The present classification of above articles has been practically in effect since April 1, 1887, except the commodity class rate, which was first put in effect by the Grand Trunk Railway Company of Canada in its tariff taking effect July 27, 1888, from Montreal to United States points. Afterwards, by the same company, it was put in effect from Portland to a large number of United States points, taking effect November 25, 1889. Again it was put into effect May 1st, 1890, by the same company from Montreal to United States points hereinafter named. The Grand Trunk Railway Company has been a member of the Trunk Line Association for more than ten years,

and is still a member of that association. With the exception of the Grand Trunk Railway Company of Canada, the Trunk Line Association is made up exclusively of American rail carriers. In each of the above tariffs of the Grand Trunk Railway of Canada and as part of each of them the entire numbered classes, 1st, 2d, 3d, 4th, 5th and 6th, of the current Trunk Line classification and tariffs of rates to the United States points herein named, are also made parts of these tariffs, except as changed by the commodity class rates above stated.

The tariff of July 27, 1889, is made from Montreal to the following United States points:

Chicago, Ill.
Haskells, Ind.
Milwaukee, Wis.
St. Paul, Minn.
Minneapolis, Minn.
Grand Haven, Mich.
Grand Rapids, Mich.
Ludington, Mich.
Muskegon, Mich.
East St. Louis, Ill.
St. Louis, Mo.
Louisville, Ky.
Indianapolis, Ind.
Cincinnati, Ohio.
Toledo, Ohio.
Jackson, Mich.
Detroit, Mich.
Port Huron, Mich.
East Saginaw, Mich.
Bay City, Mich.
Buffalo, N. Y.
Pittsburgh, Pa.

The tariff of the Grand Trunk Railway Company of Canada taking effect November 25th, 1889, was from Portland to the following United States points:

Chicago, Ill.
Haskells, Ind.
Milwaukee, Wis.
Grand Rapids, Mich.
Grand Haven, Mich.
Ludington, Mich.
Muskegon, Mich.
East St. Louis, Ill.
St. Louis, Mo.
Louisville, Ky.
Indianapolis, Ind.
Cincinnati, Ohio.
Toledo, Ohio.
Jackson, Mich.

Detroit, Mich.
Port Huron, Mich.
East Saginaw, Mich.
Bay City, Mich.
Buffalo, N. Y.
Rouse's Point, N. Y.
Fort Covington, N. Y.
Bombay, N. Y.
Helena, N. Y.
Massena Springs, N. Y.

In order to appreciate how the tariffs are made and withdrawn and then made again, respectively from Portland, Maine, to United States points, and from Montreal, Canada, to United States points, it is necessary to remember that Portland, Maine, is the winter port at which the Grand Trunk Railway Company of Canada makes connection with the steamship lines, usually from during the month of November to during the month of May following; and Montreal, Canada, is the summer port at which the Grand Trunk Railway Company of Canada meets its steamship connecting lines, usually from during the month of May to during the month of November following.

This tariff of the Grand Trunk Railway Company of Canada, taking effect May 1st, 1890, is upon shipments from Montreal to the following United States points:

Chicago, Ill.
Haskells, Ind.
South Bend, Ind.
Milwaukee, Wis., via Grand Haven.
Milwaukee, Wis., via Ludington.
Milwaukee, Wis., all rail.
St. Paul, Minn.
Minneapolis, Minn.
Grand Rapids, Mich.
Grand Haven, Mich.
Ludington, Mich.
Muskegon, Mich.
East St. Louis, Ill.
St. Louis, Mo.
Louisville, Ky.
Indianapolis, Ind.
Cincinnati, Ohio.
Toledo, Ohio.
Jackson, Mich.
Detroit, Mich.
Port Huron, Mich.
Battle Creek, Mich.
East Saginaw, Mich.
Bay City, Mich.
Buffalo, N. Y.
Black Rock, N. Y.

Suspension Bridge, N. Y.
Pittsburgh, Penn.

200 This commodity rate class tariff, with the other classes from which the above table has been compiled, was issued by the Grand Trunk Railway of Canada, to take effect May 1st, 1890, and is numbered $\frac{D}{G\ 13}$ from Montreal, Canada, to Chicago, Ill., and twenty-five other named points in the United States. It expressly provides that "these rates are subject to the official classification except where otherwise provided for, and to the rules and regulations of carriage of the Grand Trunk Railway Company of Canada." The only exception provided by this tariff from the Trunk Line classification and rates is the commodity class rate. It thus adopts and enforces the Trunk Line classification and rates as its own classification tariff rates on all other traffic to all the above-named United States points except that named in this commodity class. It further provides that the special commodity rates will apply on shipments of the articles named in the commodity class in car-loads of 24,000 pounds or over. The rates are the same from Portland, Maine, for example, to Chicago that they are from Montreal, Canada, to Chicago. The rates named in class 6 of the Trunk Line classification applying to all the articles in that class are also based upon car-load quantities of 24,000 pounds or more.

The effect of this commodity class is that upon the fourteen articles selected by it out of the sixth class and placed in its commodity class, the rate, upon these fourteen articles, for example, from Portland to Chicago, or from Chicago to Portland, or from Montreal to Chicago, or from Chicago to Montreal, is 13 cents per hundred pounds, while the several hundred articles with which these have been classed in the sixth class prior to and since the order of the commission of March 23, 1889, and now, are charged 22 cents per hundred pounds for the same service in carrying them. The reduction made as to the few articles taken out of the 5th class, and the two articles taken out of the fourth class, will sufficiently appear by the figures in the above table. To the other twenty-five United States points, the respective rates, sixth class and commodity class, are more or less, as the case may be, according to distance, but the differences between them are proportionately about the same as to Chicago.

It appears that it has long been a standing rule of the Trunk Line Association, of which the Grand Trunk Railway Company of Canada is a member, that all commodity classes shall be submitted to the commissioner of the Trunk Line Association before being put out, but from some cause it appears that this was not done in the case of this commodity class in the three tariffs of the Grand Trunk Railway of Canada taking effect July 27th, 1889, November 25th, 1889, and May 1st, 1890. This circumstance is referred to only as showing the history of this commodity class rate and how it originated. The Grand Trunk Railway Company of Canada is an actively competing line with the American railway carriers, members of the Trunk Line Association, for the carriage of these imported articles and other

articles with which they are classed in sixth class, from ports of entry to Chicago and other United States points named, and from Chicago and other United States points named to such ports of entry respectively. It is insisted by the Grand Trunk Railway Company that inasmuch as it has the right to make its own tariffs and charge its own rates, it is no violation of law for it to do this; and that it did this in order to comply with the order of the commission of the 22d of March, 1889, and to hold its import traffic business to ports of entry; and that it is a compliance with that order.

A large latitude must undoubtedly be allowed a carrier in framing its classifications and rates to meet the peculiar exigencies of business along its own line, and when we say exigencies, we mean the circumstances and conditions surrounding such business. But assuming, as a matter of fact, for the purposes of this opinion, upon all the evidence in this case, that the rates upon the several hundred articles named, for example, in sixth class, are just and reasonable—and certainly the Grand Trunk Railway Company would seem to be committed to this proposition because it charges these rates upon these articles and so publishes them in its tariffs alongside these commodity class rates—we are then confronted with the further fact that this company has selected from that class a few enumerated articles, placed them in what is called a "commodity class," and largely reduced the rates upon them, and then we find the further fact that the articles thus selected by it are each and all articles of import traffic, and we are brought to another fact, that the Grand Trunk Railway Company of Canada did this in order to hold its import traffic and to have the inland rates upon the few articles named in its commodity class the same upon its inland tariffs from ports of entry to destination, whether these were carried as imports or as other traffic, the fact being that these commodity rate articles carried by it are imported traffic, and there being no carriage by it of the same articles under its commodity class rates which are not import traffic.

The act to regulate commerce, amongst other things, distinctly provides in the second section that a preference of one kind of traffic over another of a like kind, and transported under substantially similar circumstances and conditions and between the same
201 points, over the same line, must not be given. And, again, the third section of the statute provides that it shall be unlawful to make or give any undue or unreasonable preference to any particular description of traffic or to subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In the case of Martin *v.* The Southern Pacific Company and others, 2 Inters. Com. Rep. 1, 2 I. C. C. Rep. 1, this commission held that a violation of the fourth section of the act can be accomplished by differences in classification as well as by differences in tariff rates. The commission is strongly committed in various cases to the doctrine that unjust discrimination may be perpetrated by differences in classification just as well as in any other way. And it is equally true that unlawful preference or unlawful prejudice to a particular class of traffic or to a

locality or to a shipper may be reached or may be accomplished by differences in classification as well as by any other method.

Now, here, as a matter of fact, this carrier, as the proof shows, arranged a method of complying with the order of the commission of March 23, 1889, to the effect that certain articles of import traffic should be carried to destination from the port of entry and *vice versa* at the same rates upon the inland tariff. And it does this, not by taking all traffic of a like class with the import traffic and carrying all at the same rate, or indeed a considerable number of articles of that class, but it selects out of a large number of articles of the same class, a few of which are peculiarly the subject of import, places these in what is called a commodity class, makes very large reductions upon them, while it holds all other articles of the same class transported over the same line and between the same points at the regular class rate, which is much higher. It had previously long shown, and it does not deny now, as its traffic manager testified in this proceeding, that according to the strict principles of classification the rates should be the same upon the articles it had put in the commodity class, that they are upon the large number of other articles in the sixth class. It had for many years always admitted and acted upon the rule in its business methods, up to July 27, 1889, November 25, 1889, and May 1, 1890, that the few articles selected by it and placed in the commodity class are articles of "a like kind of traffic" with those in the regular numbered class, whether it be sixth class, fifth class or the fourth class.

Very manifestly the purpose of the general order of March 23, 1889, was to prevent a preference being given in rates or otherwise to a particular class of freight against other freight of the same class. But if the articles selected and put into a separate class and transported at lower rates are published in tariffs, then that becomes a class of itself which the carrier has made, and the question arises whether the carrier may do this without its being a violation of that order or of the statute; and this would seem to be the exercise of a right under the statute which the carrier may do. This right of the carrier is one that is very broad and general. The fact that its exercise may be productive of cutting or lowering rates does not prove that it is a method of business to which the carrier may not resort in the exigencies of its business. It is a right the denial of which would affect vitally every interstate carrier in the land, as well as the public they serve.

It is very true that articles classified alike are presumptively entitled to equal rates, and if a difference is made by a carrier it assumes the burden of sustaining it by satisfactory evidence. See McMoran *et al. v.* The Grand Trunk Railway Company of Canada *et al.*, 2 Inters. Com. Rep. 604, 3 I. C. C. Rep. 252. But that rule assumes that the articles are in the same class. Here the carrier has made two separate and distinct classes, and therefore that rule has no application.

It may well be said, for it is plainly apparent, that such a method as has been here described is well calculated to precipitate "a war

of rates" between the Grand Trunk Railway of Canada and its rival competing American lines, with all the frauds and injury to the carriers and the public which we have so often described as resulting from such "a war of rates." But this does not take away from the Grand Trunk Railway of Canada the right to make separate classes for its traffic as it has here done.

The manner in which the Canadian Pacific Railway Company complied with the order of the commission above referred to of date March 23, 1889, was in substance the same as the method adopted by the Grand Trunk Railway Company of Canada, which has already been stated at length and need not be here repeated. The tariff of this company No. 6, taking effect May 10, 1889, shows the rates in effect from Montreal to certain United States points on the 3d day of December, 1889, when the complaint in this proceeding was filed. The tariff of this company taking effect May 1st, 1890, shows the rates in effect from Montreal to certain United States points at the time this complaint was heard in the month of June, 1890. The following table will show these rates respectively
202 at the dates named when the complaint was filed and the proceeding was heard under the special rate, which is the same as the commodity rate of the Grand Trunk Railway Company of Canada, and also the rate upon these articles as fourth, fifth and sixth class, respectively :

Canadian Pacific Railway—Montreal to Chicago.

	Official classification.	Rates in effect on Dec. 3, 1889. Tariff No. 6 of May 10, 1889.		Rates in effect June, 1890. Tariff No. 117, May 1st, 1890.	
		Class rate.	Sp'c'l rate.	Class rate.	Sp'c'l rate.
Bleach	6	22	20	22	13
Blooms	6	22	20	22	13
Billets	6	22	20	22	13
Brick	6	22	20	22	13
Cement	6	22	20	22	13
Clay	6	22	20	22	13
Earthenware in crates	5	26	20	26	13
Galvanized iron	5	26	20	26	13
Granite and sandstone	5	26	20	26	13
Pig-iron	6	22	20	22	13
Scrap iron	6	22	20	22	13
Steel iron	6	22	20	22	[illegible]
Speigle iron	6	22	20	22	
Puddled bars	6	22	20	22	
Soda, ash, caustic, silicate	6	22	20	22	5
Soda, bicarb., crystals	4	31	20	31	13
Tin plate	5	26	20	26	13
Canada plate	5	26	20	26	3
Salt	6	22	20	22	15
Wire rods	5	26	20	26	13
Nail rods	5	26	20	26	13
Sheet lead	4	31	20	31	13
Whiting	6	22	20	22	13
Window glass, common	5	.....	.....	26	13

Each of these tariffs published also as part of such tariffs, respectively, the class rates numbered 1, 2, 3, 4, 5 and 6 of the Trunk Line classification, applying to the same United States points, to which is added the "special" class rates above referred to.

On the tariff of May 1st, 1889, there is the following notation:

"To apply on import traffic from European ports, delivered to

the Canadian Pacific railway by ocean vessels on the wharves at Montreal for furtherance to United States points as designated within. Freight received from steam or sailing ship lines at Montreal for United States points will be subject to the following conditions: Rates shown in this tariff are subject to the official classification No. 5 or subsequent issues, with the exception as noted, and to the rules and regulations of transportation adopted by the Canadian Pacific Railway Company."

At the bottom of this tariff and as part of it is the following notation:

"Above special-column rates will apply only on the following commodities:

Bleach,
Blooms,
Billets,
Brick,
Cement,
Clay,
Earthenware in crates,
Galvanized iron,
Granite and sandstone,
Pig-iron,
Scrap iron,
Steel iron,
Speigle iron,
Puddled bars,
Soda
  ash
  caustic,
  silicate,
  bicarb.,
  crystals,
Tin plate,
Canada plate,
Salt,
Wire rods,
Nail rods,
Sheet lead,
Whiting.

The exception noted to the official classification of the Trunk Line Association is the "special" class rate.

The following table will show the United States points to which this tariff relates on freight carried from Montreal, Canada:

Buffalo, New York.
Detroit, Michigan.
Toledo, Ohio.
Cleveland, Ohio.
Cincinnati, Ohio.
Indianapolis, Indiana.
Bay City, Michigan.
Louisville, Kentucky.

Chicago, Illinois.
Milwaukee, Wisconsin.
Grand Rapids, Michigan.
East St. Louis, Illinois.
St. Louis, Missouri.
St. Paul and Minneapolis, Minnesota.
Duluth, Minnesota.

The tariff of this company, taking effect May 1st, 1890, contains the following announcements:

"To apply on import traffic from European ports, delivered to the Canadian Pacific railway by ocean vessels."

And again—

"Freights received from steam or sailing ship lines at Montreal for United States points will be transported subject to the following conditions:

Rates shown in this tariff are subject to the current official classification, with exceptions as noted and to the rules and regulations of transportation adopted by the Canadian Pacific Railway Company."

Again the exception noted is the "special" class rate upon substantially the same articles and gotten up in substantially the same manner as in the tariff taking effect May 10th, 1889. On this tariff taking effect May 1st, 1890, is the following notation:

203 "During the season of navigation the within rates will govern on local business from Montreal and points west in a direct line."

The reference to "season of navigation" in this notation is understood to apply to navigation on the St. Lawrence river and by the canals and lakes during the season that these are open for navigation.

The following table will show the United States points to which this tariff taking effect May 1st, 1890, applies:

Buffalo, New York.
Black Rock, New York.
Suspension Bridge, New York.
Detroit, Michigan.
Toledo, Ohio.
Cleveland, Ohio.
Cincinnati, Ohio.
Jackson, Michigan.
Indianapolis, Indiana.
Battle Creek, Michigan.
Chicago, Illinois.
Milwaukee, Wisconsin.
Grand Rapids, Michigan.
South Bend, Indiana.
Bay City, Michigan.
East Saginaw, Michigan.
Louisville, Kentucky.
St. Paul, Minnesota.
Minneapolis, Minnesota.

Duluth, Minnesota.

West Duluth and intermediate points on through line west of Sault Sainte Marie.

St. Louis, Missouri.

West Superior, Wisconsin.

This tariff taking effect May 1st, 1890, sets out as part thereof rates embracing the first, second, third, fourth, fifth and sixth numbered classes of the Trunk Line official classification, to which is added a column of special rates. By the tariffs of the Grand Trunk Railway Company of Canada these "special" rates are called "commodity" rates, and by the tariffs of the Canadian Pacific Railway Company they are called "special" rates.

All that has been said in reference to the Grand Trunk Railway Company of Canada in selecting a few enumerated articles which are the subject of import, putting them in a commodity-class rate at greatly reduced rates, and leaving a very large number of other articles of the class from which these few articles were selected at much higher rates in the sixth class of the Canadian Pacific Railway Company, applies with equal force to the course pursued by the Canadian Pacific Railway Company in its efforts to comply with the order of the commission of March 23, 1889, and is governed by the same principles which allow the carrier to make different classifications to meet the circumstances and conditions surrounding the transportation of its traffic.

It will be seen, from what has been here said, that the commission is of the opinion that "commodity" or "special" rates are not in themselves violations of the statute necessarily. Like numbered class tariffs, they have to be scrutinized and considered with reference to the rates they charge, the traffic upon which it is charged and the relations they bear to the tariffs upon other similar articles, and the circumstances and conditions under which the "commodity" tariff rate or "special" rate is made. These "commodity" tariffs may be said to be always exceptional and "special." Carriers, as a rule, have a regular numbered classification in their tariffs for nearly all of the different articles of transportation. Commodity rates, as a rule, are lower than numbered class rates, and are made upon coarse, cheap articles, more usually than otherwise between interior points. For example, they are made upon iron articles; upon cheap articles, like peas from Norfolk to Chicago, or upon crushed oyster shells from Baltimore to Pittsburgh, and upon some other articles that are so coarse and cheap as not to be of sufficient value to bear the numbered class rates. Commodity rates are usually emergency rates and do not remain in force for any considerable length of time. They are sometimes made, also, to meet a cut in rates found to have been made upon similar articles by a competitor. Like other rates, they are lawful when they are just and reasonable and perform a lawful office. Like other rates, they are unlawful when they perform the office of an unjust discrimination against other similar traffic or an unlawful preference or prejudice against a shipper or a locality. The freight business of the United States is, comparatively speaking, carried to a small ex-

tent under commodity tariffs by interstate carriers, except in the case of the transcontinental lines. The business of the transcontinental lines, from considerations not necessary here to discuss, is carried largely upon commodity tariffs. But these last-named commodity rates cut no figure upon any question involved in this proceeding.

These being the conclusions of the commission upon all the material facts found in this proceeding, it is therefore ordered by the commission that the respondents, The Texas & Pacific Railway Company, The St. Louis, Iron Mountain & Southern Railway Company, The Louisville, New Orleans & Texas Railway Company, The Wabash Railroad Company, The Southern Pacific Company, The Union Pacific Railway Company, The Northern Pacific Railroad Company, The Baltimore & Ohio Railroad Company, The Lehigh Valley Railroad Company, The Canadian Pacific Railway Company, and each of them, forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States or any port of entry in a foreign country adjacent to the United States upon through
204 bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of destination, or at any other than the same rates established in such inland tariff, for the carriage of other like kind of traffic, in the elements of bulk, weight, value and expense of carriage.

As to these carriers it is ordered by the commission that this order take effect on and after the fifth day of May, A. D. 1891.

And it is further ordered by the commission that all the other defendants than those last above named must in the future compl with the rules and principles settled in this report and opinion relation to the carriage of import traffic shipped from any foreig port to any port of entry of the United States, or any port of in a foreign country adjacent to the United States, upon th bills of lading destined to any place within the United Sta carrying the same upon their inland tariff covering other lik of traffic in the elements of bulk, weight, value and expense riage between such ports of entry and place of destination w. the United States.

And it is further ordered by the commission that as to The Lake Shore & Michigan Southern Railway Company, The New York, Lake Erie & Western Railroad Company, The New York, Pennsylvania & Ohio Railroad Company, The West Shore Railroad Company, The Boston & Maine Railroad Company, The New York, Chicago & St. Louis Railroad Company, The Central Railroad Company of New Jersey, The Philadelphia & Reading Railroad Company, The Chicago & Atlantic Railway Company, The Michigan Central Railroad Company, The New York Central & Hudson River Railroad Company, The Delaware, Lackawanna & Western Railroad Company, The Chicago & Grand Trunk Railway Company, The Grand Trunk Railway of Canada, The Pennsylvania Railroad Company, The Pittsburgh, Fort Wayne & Chicago Railway Company,

The Pittsburgh, Cincinnati & St. Louis Railway Company and the Illinois Central Railroad Company, this proceeding be and the same is hereby dismissed.

205 EXHIBIT 35.

Order.

206 At a general session of the Interstate Commerce Commission held at its office, in Washington, D. C., on the 29th day of January, A. D. 1891.

Present: Hon. Thomas M. Cooley, chairman; Hon. William R. Morrison, Hon. Walter L. Bragg, Hon. Wheelock G. Veazey, commissioners.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION, THE Commercial Exchange of Philadelphia, and The San Francisco Chamber of Commerce

vs.

THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, FT. Wayne and Chicago Railway Company, The Pittsburgh, Cincinnati and St. Louis Railway Company, The New York Central and Hudson River Railroad Company, The Michigan Central Railroad Company, The Lake Shore and Michigan Southern Railway Company, The Chicago and Grand Trunk Railway Company, The New York, Lake Erie and Western Railroad Company, The Chicago and Atlantic Railway Company, The New York, Pennsylvania and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The West Shore Railroad Company, The Delaware, Lackawanna and Western Railroad Company, The Grand Trunk Railway Company of Canada, The Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The Philadelphia and Reading Railroad Company, The Central Railroad Company of New Jersey, The Boston and Maine Railroad Company, The Louisville, New Orleans and Texas Railway Company, The St. Louis, Iron Mountain and Southern Railway Company, The Southern Pacific Company, The Union Pacific Railway Company, The Northern Pacific Railroad Company, The Canadian Pacific Railway Company, The Texas and Pacific Railway Company, The Illinois Central Railroad Company, The Lehigh Valley Railroad Company.

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This case being at issue upon complaint and answers on file, and having been assigned for hearing on the 10th day of June, A. D. 1890, and notice thereof having been duly given to each of the parties to this proceeding, and hearing having been had upon the pleadings, proofs, and arguments of counsel on said 10th day of June, A. D. 1890, and days subsequent thereto, and full investigation of all the matters and things involved in this proceeding having been had, and the report and opinion of the commission hav-

ing been made and filed, whereby, among other things, it is found and decided that rates and charges upon, facilities afforded to, and treatment of any article of foreign merchandise by the defendants, or either of them, when such article of foreign merchandise is brought from any foreign port of shipment to any port of entry of the United States, or from any foreign port of shipment to any port of entry of a foreign country adjacent to the United States, and is transported by them, or either of them, from any such port of entry to a place of destination within the United States under a through bill of lading from any such foreign port of shipment to such place of destination within the United States, which are different in any respect from lawfully established rates and charges upon, facilities afforded to, or treatment of any article of domestic or other merchandise which is a like kind of traffic with any such article of foreign merchandise and is transported by them, or either of them, from any such port of entry to the same place of destination within the United States under bills of lading from such port of
208 entry to such place of destination, are, and any such different rate, charge, facility or treatment is, unlawful and in violation of the provisions of the act to regulate commerce. And it is also found and decided by said report and opinion of the commission that certain of the defendants, that is to say, The Lake Shore & Michigan Southern Railway Company, The New York, Lake Erie & Western Railroad Company, The New York, Pennsylvania & Ohio Railroad Company, The West Shore Railroad Company, The Boston & Maine Railroad Company, The New York, Chicago & St. Louis Railroad Company, The Central Railroad Company of New Jersey, The Philadelphia & Reading Railroad Company, The Chicago & Atlantic Railway Company, The Michigan Central Railroad Company, The New York Central & Hudson River Railroad Company, and The Delaware, Lackawanna & Western Railroad Company, have not unlawfully discriminated as aforesaid in rates and charges, facilities and treatment in respect to transportation of like kinds of import and domestic or other traffic between the same ports of entry and the same points of destination; and that certain others of the defendants, that is to say, The Chicago & Grand Trunk Railway Company, The Grand Trunk Railway Company of Canada, The Pennsylvania Railroad Company, The Pittsburgh, Ft. Wayne & Chicago Railway Company, The Pittsburgh, Cincinnati & St. Louis Railway Company, and The Illinois Central Railroad Company, have on various dates subsequent to the 23rd day of March, 1889, and in compliance with an order of the commission issued on said date, severally ceased and desisted from unlawfully discriminating as aforesaid in rates and charges, facilities, and treatment in respect to transportation of like kinds of import and domestic or other traffic between the same ports of entry and the same points of destination.

It is ordered and adjudged, that the defendants, The Texas & Pacific Railway Company, The St. Louis, Iron Mountain &
209 Southern Railway Company, The Louisville, New Orleans & Texas Railway Company, The Wabash Railroad Company,

The Southern Pacific Company, The Union Pacific Railway Company, The Northern Pacific Railroad Company, The Baltimore & Ohio Railroad Company, The Lehigh Valley Railroad Company, The Canadian Pacific Railway Company, and each of them, do, on and after the 5th day of May, A. D. 1891, wholly cease and desist from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, or at any other than the same rates established in said published inland tariff for the carriage of other like kind of traffic, in the elements of bulk, weight, value, and expense of carriage.

It is further ordered and adjudged, that all the other defendants than those last above named must in the future also comply with the rules and principles settled in said report and opinion of the commission in relation to the carriage of import traffic shipped from any foreign port to any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading and destined to any place within the United States, by carrying the same only upon their respective published inland tariffs covering the transportation of other like kind of traffic, in the elements of bulk, weight, value, and expense of carriage, between any such port of entry and any such place of destination within the United States.

And it is further ordered and adjudged, that as to said other defendants, that is to say, The Lake Shore & Michigan Southern Railway Company, The New York, Lake Erie & Western Railroad Company, The New York, Pennsylvania & Ohio Railroad
210 Company, The West Shore Railroad Company, The Boston & Maine Railroad Company, The New York, Chicago & St. Louis Railroad Company, The Central Railroad Company of New Jersey, The Philadelphia & Reading Railroad Company, The Chicago & Atlantic Railway Company, The Michigan Central Railroad Company, The New York Central & Hudson River Railroad Company, The Delaware, Lackawanna & Western Railroad Company, The Chicago & Grand Trunk Railway Company, The Grand Trunk Railway Company of Canada, The Pennsylvania Railroad Company, The Pittsburgh, Ft. Wayne & Chicago Railway Company, The Pittsburgh, Cincinnati & St. Louis Railway Company, and The Illinois Central Railroad Company, this proceeding be, and the same is hereby, dismissed.

And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce.

211 EXHIBIT 36.

212 INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, *Dec.* 30, 1891.

Statement showing rates in cents per 100 pounds charged for the transportation of commodities named from Liverpool and London, England, via New Orleans, the Texas and Pacific Railway Company and the Southern Pacific Company system, to San Francisco, and also from New Orleans via same route to same destination.

Commodities.	From Liverpool and London, Eng., to San Francisco.	From New Orleans, La., to San Francisco.
	In cents per 100 *lbs.*	*In cents per* 100 *lbs.*
Agricultural impl's	89	120
Blacking	89	114
Books	107	288
Boots and shoes	107	370
Burlaps	89	114
Buttons	107	288
Candles	89	114
Canned fish	89	114
Carpets	107	288
Cashmeres	107	370
Cement	89	106
Chinaware	107	182
Chocolate	107	125
Cigars	107	370
Clothing	107	288
Confectionery	107	370
Cordage	89	139
Crayon and chalks	107	139
Crockery	89	125
Cutlery	107	370
Drugs, common	89	202
Dry goods	107	*182
Earthenware	100	106
Feathers	107	320

*There are various rates on different kinds of dry goods, some as high as $5.62 per 100 lbs.

Commodities.	From Liverpool and London, Eng., to San Francisco.	From New Orleans, La., to San Francisco.
	In cents per 100 lbs.	*In cents per 100 lbs.*
Glassware, common	89	139
Gloves	107	370
Glycerine	107	106
Groceries, N. O. S.	89	180
Hair goods	107	
Hardware	107	187
Hats and caps	107	370
213 Hosiery	107	288
Lace	107	370
Leather	107	205
Linen	107	370
Linen goods	107	370
Milk, condensed	89	114
Nails	89	106
Optical goods	107	*260
Pins	107	322
Saddlers' goods	107	370
Soap	89	106
Soda, caustic	89	114
Tallow	89	106
Woolen goods	107	370
Tin plate	89	106
Wood pulp	89	130

* Rates on optical goods vary from $2.60 to $7.40 per 100 lbs.

Rates shown hereon applying from London and Liverpool are obtained from Texas and Pacific R'y foreign freight tariffs 27 H and 28 H, effective May 5, 1891. Rates from New Orleans are from Transcontinental Association west-bound tariff No. 34, effective Sept. 21, 1891.

C. C. McCAIN, *Auditor.*

OFFICE OF THE
INTERSTATE COMMERCE COMMISSION,
WASHINGTON, D. C.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, hereby certify that the foregoing exhibits, thirty-six

214 in number, and marked 1 to 36, both inclusive, are correct copies of the originals thereof on file among the records of the Interstate Commerce Commission.

In testimony whereof I hereunto set my hand and affix the seal of the said Interstate Commerce Commission, at the city of Washington, in the District of Columbia, this thirtieth day of December, 1891.

[L. S.] EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

A true copy of petition and exhibits.

[L. S.] EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

215 (Endorsed:) In the circuit court of the United States for the southern district of New York. The Interstate Commerce Commission *vs.* The Texas & Pacific Railway Company. Petition and exhibits. I hereby certify that on the 19th day of January, 1892, at the city of New York, in my district, I personally served the within petition and exhibits upon the within-named defendants The Texas and Pacific Railway Company, by exhibiting to C. E. Satterlee, secretary and treasurer of the above-named company, the within original, and at the same time leaving with him a copy thereof. John W. Jacobus, United States marshal, southern district of New York. Dated January 19th, 1892. U. S. circuit court. Filed Jan. 19, 1892. John A. Shields, clerk.

At a term of the circuit court of the United States for the southern district of New York, held at the post-office building in the city of New York, on the 18th day of January, 1892.

Present: Hon. William J. Wallace, circuit judge.

Circuit Court of the United States for the Southern District of New York. In Equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. —.

216 On reading and filing the petition of the Interstate Commerce Commission herein, and on motion of Edward Mitchell, Esq., United States district attorney in and for the southern district of New York,

It is ordered, that a copy of the said petition, and of this order, be served upon the said defendant by delivering the same to and leaving them with an officer or director of said company, or the agent in charge of its office, No. 195 Broadway in the city of New York, on or before the 22d day of January, 1892;

Also ordered, that the matter herein be set down for hearing and determination before this court, at a term thereof to be held in the United States circuit court room, in the United States post-office

building, in the city of New York, on the 19th day of February, 1892, at the opening of the court, or as soon thereafter as counsel can be heard, and that said defendant then show cause why a writ of injunction, or other process, mandatory or otherwise, shall not issue to restrain the said defendant from further continuing in its violations of and disobediences to the order of the said Interstate Commerce Commission, as set forth in the said petition;

Also ordered, that said defendant shall file its answer to the petition herein and serve a copy thereof on the district attorney within ten days after the service of said petition and order upon it.

WM. J. WALLACE.

(Endorsed:) Circuit court of the United States. The Interstate Commerce Commission *vs.* The Texas & Pacific Railway Company. Original. Notice and order to show cause. Edward Mitchell, U. S. district attorney for complainant. Office & P. O. address, U. S. post-office building, New York city, N. Y. I hereby certify that on the 19th day of January, 1892, at the city of New York, in my district, I personally served the within notice and order to show cause upon the within-named defendant The Texas and Pacific Railway Company by exhibiting to C. E. Satterlee, sec'ty and treasurer of
217 the above-named company the within original, and at the same time leaving with him a copy thereof. John W. Jacobus, United States marshal, southern district of New York. Dated January 19th, 1892. U. S. circuit court. Filed Jan. 19, 1892. John A. Shields, clerk.

Time to answer further extended to March 8, 1892.
New York, February 15, 1892.

EDW. MITCHELL, *U. S. Att'y.*
DILLON & SWAYNE,
For Defendant.

United States Circuit Court, Southern District of New York.

INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now comes the defendant, The Texas and Pacific Railway Company, by Winslow S. Pierce, its attorney, appearing specially for the purpose of this motion; and upon all the papers, pleadings and proceedings in this case, and upon the affidavit of Charles E. Satterlee, hereto attached, moves that the petition herein be dismissed and this proceeding discontinued.

Dated New York, March 8, 1892.

WINSLOW S. PIERCE,
Specially Appearing as Attorney for Defendant,
The Texas and Pacific Railway Company.

218 United States Circuit Court, Southern District of New York.

INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles E. Satterlee, being duly sworn, says:

That he is the secretary and treasurer of the Texas and Pacific Railway Company, and has been such since 1882. Deponent says that in the year 1886 the Texas and Pacific Railway Company was placed in the hands of receivers appointed by the circuit court of the United States for the western district of Louisiana. That said receivership was continued under proceedings to foreclose several of the mortgages of the said railway company during the years 1886, 1887 and 1888. That the receivers so appointed were John C. Brown and Lionel A. Sheldon. That subsequently to such appointment one of the receivers, Lionel A. Sheldon, resigned, and John C. Brown remained the sole receiver of said railroad and property until the termination of the receivership in October, 1888. That the general offices of said receivers were by them established and maintained throughout the period of said receivership at the city of Dallas, in the State of Texas. That, upon the termination of said receivership, the railroad and property of the said Texas and Pacific Railway Company was restored to that company, and until the present day the said Texas and Pacific Railway

219 Company has and maintains its general or principal offices in the city of Dallas, in the State of Texas.

That prior to the year 1889 the city of Marshall, Texas, claimed that the Texas and Pacific Railway Company had entered into an engagement or contract with the said city to maintain its offices, machine shops, &c., in said city of Marshall. That at the time of the appointment of said receivers there was pending in the circuit court of the United States for the eastern district of Texas, a suit instituted by the city of Marshall to compel the removal of the offices of the Texas and Pacific Railway Company to said city of Marshall, and a mandatory injunction had been obtained requiring such removal and the maintenance of such offices, machine shops, &c., at the city of Marshall, which said injunction was continued as against said receivers. That the judgment in said suit requiring such removal and maintenance of said offices at Marshall was taken by writ of error to the Supreme Court of the United States. That in the year 1889 the legislature of the State of Texas passed an act which was approved on the 27th day of March, 1889, requiring railway companies doing business with the State to maintain their general offices therein. Deponent prays that reference to said act may be had on the hearing of this application. That the executive committee of the board of directors of the Texas and Pacific Railway Company, at a meeting held in the city of New York, on the 15th day of July, 1889, adopted the following preamble and resolutions:

"Whereas, by an act of the Texas legislature approved March 27,

1889, all railroad companies chartered by the State of Texas, or owning or operating any line of railway within the State, are required to keep and maintain permanently their general offices, machine shops, round-houses, &c., within the State at certain places, and to keep all books, accounts, &c., at said offices; and

Whereas, the Texas and Pacific Railway Company, without waiving any of its chartered or legal rights in the premises,
220 is willing, out of respect to the legislative expression of the State of Texas, to consider said act as applicable to it and to act accordingly; therefore,

Resolved, That it is the purpose of this company fully to comply with said law in letter and spirit, and to that end the general manager of this company be, and is hereby, instructed to immediately make arrangements for the removal of the general offices now at Dallas to Marshall, Texas, and to establish in the said city of Marshall the following offices of this company, viz:

Office of vice-president.
" " general manager.
" " chief engineer.
" " secretary and treasurer.
" " auditor.
" " general freight agent.
" " general passenger agent.
" " superintendent of motive power and machinery.
" " master of transportation.
" " stock and fuel agent.
" " claim agent.

and to have all the books and papers connected therewith kept in said general offices."

That the said Texas and Pacific Railway Company was then in the possession of its railroad and property, and the general or principal offices of the said receivers which had been established at Dallas, Texas, as aforesaid, were continued as the general or principal offices of the said railway company. That when the said railway company, in pursuance of the resolution hereinbefore recited, was about to remove its said offices to Marshall, Texas, it was prevented from doing so by an injunction obtained by certain citizens of the city of Dallas in one of the local courts restraining and prohibiting such removal. That said injunction was continued upon final hearing, and pending the appeal thereof the Supreme Court of the
221 United States decided the said case of The City of Marshall *vs.* The Texas and Pacific Railway Company adversely to the city of Marshall. The opinion of the court in that case is found in volume 136 of the United States Supreme Court Reports. The said railway company has ever since continued to maintain, and now does maintain, its general or principal offices at said city of Dallas.

Deponent says that the only office maintained by the defendant railway company in the city of New York consists of two rooms at 195 Broadway in said city. That the president, one of the vice-presidents, and this deponent, the secretary and treasurer, are the only officers of the said company who reside in the city of New

York, or who have any office in said city connected with the affairs of the said railway company, except a freight agency at 321 Broadway in charge of a general eastern agent. Said office of the company in the city of New York is also known as the transfer office of the said railway company, and transfers of the stock of said company may be made at said office.

That the general or principal offices of the Texas and Pacific Railway Company, located at Dallas, Texas, consist of the offices of the heads of departments of the said railway company, namely: The general management, covering the operation of the road and transportation of freight and passengers; the accounting department; the legal department of the State; the land and tax department, and the supply department, and that at said general offices at Dallas, Texas, the offices of the following officers and agents of the said railway company are maintained, namely: Third vice-president; general manager; the auditor; the general freight agent; the general passenger agent; the land and tax commissioner; the assistant secretary and treasurer; master of transportation; general attorney for the State of Texas, and other subordinate officers and agents of said railway company, and that all the
222 books and papers and vouchers connected with said offices are kept at said offices, and the revenues from the railroad and property of the said railway company are there received and disbursed. That the disbursements of the said railway company in the city of New York are made almost exclusively out of remittances received from the general offices of the company at Dallas, and extend only to the payment of interest upon the bonded debt of the said railway company, and incidental disbursements, including expense of maintaining said New York office. The disbursements by this deponent as treasurer of the company are reported monthly to the auditor, and the vouchers covering such disbursements are transmitted to him with such monthly reports and kept in his office at Dallas; and all journal entries connected with the transactions of the New York office are transmitted to the auditor for entry upon the general books of the company which are kept in his office.

That the Texas and Pacific Railway Company has 336 miles of road in the State of Louisiana, making a through line from New Orleans to the Texas State line, and thence to El Paso in the State of Texas. The accounting covering all of the operations of the said railway company and all its property in the State of Louisiana is had at the general offices of the railway company at Dallas, and the officers of the said railway company at Dallas are in charge and control of these matters.

Deponent states that the defendant railway company is a corporation organized under the laws of the United States, and prays upon the hearing herein that reference may be had to its charter and to the laws of the State of Texas affecting the said railway company. That the annual meeting of the stockholders of the defendant railway company is held in the city of New York, and an adjourned meeting of said stockholders is held at the general offices of

the company at Dallas. This is so in respect to the annual
223 meeting of the board of directors as well. That the meetings of the executive committee of the board are usually held in the city of New York. These meetings are infrequent—averaging, say, two to six in a year.

C. E. SATTERLEE.

Sworn to and subscribed before me this 8th day of March, 1892.
[SEAL.] E. A. JACKSON,
Notary Public.

(Endorsed:) U. S. circuit court, southern district of N. Y. Interstate Commerce Commission against The Texas & Pacific R'y Co. Affidavit & motion to dismiss. W. S. Pierce, att'y, &c., 16 Broad St. U. S. circuit court. Filed Mar. 8, 1892. John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now comes the Texas and Pacific Railway Company, by Winslow S. Pierce, its attorney, and without entering an appearance herein, or coming for any purpose than to file this motion, and appearing specially for that motion only, upon all the papers, pleadings and proceedings in this cause, and upon the affidavits of Charles E. Satterlee, hereto attached, moves that the service of the peti-
224 tion herein and of the order of the court herein, a copy of which was delivered to and left with Charles E. Satterlee, secretary and treasurer of the defendant company, on the 19th day of January, 1892, be vacated and set aside, and also moves that the petition herein be dismissed for want of jurisdiction in this court of the subject-matter of this suit, proceeding or petition or of the defendant herein.

Dated New York, March 8, 1892.

WINSLOW S. PIERCE,
Specially Appearing as Attorney for the Defendant, The Texas and Pacific Railway Company.

(Endorsed:) U. S. circuit court, southern district of New York. The Interstate Commerce Commission against The Texas and Pacific Railway Company. Motion. Winslow S. Pierce, appearing specially, &c., for def't. U. S. circuit court. Filed April 4, 1892. John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION *against* THE TEXAS AND PACIFIC RAILWAY COMPANY. } Plea to the Jurisdiction.

Now comes the defendant The Texas and Pacific Railway Company, and without entering an appearance herein, or coming for any purpose than to file this plea in abatement and to the jurisdiction of the court, and by way of abatement to the petition and
225 proceeding of the plaintiff in this behalf, and for plea to the jurisdiction of the court of the subject-matter of the suit, proceeding or petition or of the defendant herein, this defendant shows that this court ought not to have or to take further cognizance of the suit, proceeding or petition aforesaid; and in support of this plea states that the said defendant The Texas and Pacific Railway Company had not at the time of the filing of the petition of the said complainant herein or the institution of this proceeding, nor has it at any time since that time, nor has it now, its principal office in the southern district of New York. And this defendant protests that it has not violated or disobeyed the order or requirement of the Interstate Commerce Commission, as set forth in the said petition within the State of New York, and specially alleges that it has not at any time violated or disobeyed the same within the southern district of the State of New York, or at any place within the jurisdiction of this court. And this defendant avers that by reason of the facts hereinbefore stated this court has no jurisdiction in the suit, petition or proceeding of the said complainant, or of the cause of action or complaint therein stated, or the subject-matter thereof, nor of the person of this defendant.

Wherefore, this defendant prays judgment whether this court can or will take further cognizance of the suit, proceeding or petition aforesaid, and that the same may be quashed and dismissed by this court.

WINSLOW S. PIERCE,
Attorney for the Defendant, Specially Appearing for the Purpose of this Plea.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George J. Gould, being duly sworn, says: That he is the first vice-president of the defendant company; that he has read the foregoing plea and saith the same is true in point of fact of his own knowledge, except as to those matters and things which
226 are therein alleged on information and belief, and as to those matters he believes it to be true, and that said plea is not interposed for delay.

GEORGE J. GOULD.

Sworn to before me this 17th day of March, 1892.
[SEAL.]
E. A. JACKSON,
Notary Public, N. Y. Co.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

JOHN F. DILLON, *Counsel.*

(Endorsed:) U. S. circuit court, southern district of N. Y. The Interstate Commerce Commission against The Texas and Pacific Railway Co. Plea. Winslow S. Pierce, specially appearing, &c., for def't. U. S. circuit court. Filed April 4, 1892. John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

WALLACE, *J.*:

The question in this case is whether the principal office of the defendant is at the city of New York within the meaning of section 16 of the act of Congress, commonly known as the in-
227 terstate commerce act. That section confers jurisdiction upon the circuit courts of the United States to enforce any lawful order of the Interstate Commerce Commission, and in that behalf authorizes the commission to apply in a summary way by petition to the circuit court sitting "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement may happen."

The defendant is a corporation created by an act of Congress, and operates a railroad in the States of Louisiana and Texas. The act of incorporation does not prescribe where the principal office shall be kept. If the office where the president, the first vice-president and the secretary and treasurer have their business domicile, where the regular meetings of the stockholders, the board of directors, and the executive committee are held, where certificates of stock are issued and registered upon the books, and where the profits, if any are earned, are received and distributed to the stockholders, is the principal office of the corporation instead of that place where the subordinate officers and agents of the corporation who are in charge of the operating, traffic and accounting departments of its business, discharge their duties—the New York office is the principal office.

The principal office of the corporation is commonly understood to be its chief office or head office—the office at which its most important affairs are regulated and controlled. I conclude that the New York office is the principal office of the defendant within the meaning of the statute.

The statute intends to lodge the power of enforcing any lawful order of the commission with that particular circuit court which can most effectually compel obedience to its process in the particular case. Obedience to the order of the court is to be enforced by attachment of the directors, officers or agents of the corporation, or

by any other process incident or applicable to writs of injunction.

In case of disobedience process of attachment would ordinarily be most effectual against the chief executive officers of the
228 corporation, and there would seem to be more propriety in directing such process to them than to the subordinate agents. These officers are ordinarily to be found at the head office of the corporation.

The plea is overruled.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The Interstate Commerce Com. ag'st The Texas & Pac. R'y Co. Wallace, J. U. S. circuit court. Filed Apr. 4, 1892. John A. Shields, clerk.

At a term of the circuit court of the United States for the southern district of New York, held at its rooms in the post-office building in the city of New York on the fifteenth (15th) day of April, 1892.

Present: Hon. William J. Wallace, circuit judge.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Defendant's motion to dismiss this proceeding for want of jurisdiction and its plea in abatement having come on to be heard together upon the several affidavits of Charles E. Satterlee, George J. Gould and John D. Kernan, heretofore filed, and the stipulation of the parties to this proceeding relating thereto; and the court having heard Hon. John F. Dillon and Winslow S. Pierce, Esq., counsel for defendant in support of said motion and plea, and
229 Hon. Edward Mitchell, United States district attorney, and Hon. John D. Kernan, counsel for complainant, in opposition to said motion and plea, and due deliberation having been had, it is

Ordered, that defendant's said motion to dismiss this proceeding for want of jurisdiction be and the same hereby is denied, to which order the defendant then and there excepted; and it is—

Ordered, adjudged and decreed, that defendant's said plea in abatement be overruled, to which ruling the defendant then and there excepted.

Further ordered, that defendant have until the next rule day to serve its answer to the petition of complainant herein.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. The Interstate Commerce Commission *versus* The Texas and Pacific Railway Co. Order and decree. Edward Mitchell, United States attorney, attorney for plaintiff. U. S. circuit court. Filed Apr. 15, 1892. John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Bill of Exceptions.

Be it remembered, that at a term of said court, held on the 17th day of March, 1892, defendant's motion to vacate the service
230 of the petition and of the order of court herein, and to dismiss this proceeding for want of jurisdiction and its plea in abatement came on to be heard together before Hon. William J. Wallace, circuit judge, and thereupon a certain stipulation or agreement in words and figures, as follows, was filed with the clerk and read to the court:

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

It is stipulated by and between the parties (the defendant appearing specially for the purpose of this stipulation) that the question of jurisdiction of this court raised by the motion of the defendant to set aside and vacate the service of the original order and petition herein, and also by this plea in abatement and to the jurisdiction, may be submitted to the court upon the order of the court herein made on the 18th day of January, 1892, as to the service of said petition, the several affidavits of Charles E. Satterlee, Esq., verified respectively on the 8th, 11th, and George J. Gould, verified 17th days of March, 1892; and the affidavit of John D. Kernan, verified on the 18th day of March, 1892, and that the said affidavits shall, subject to all objections as to competency and relevancy, be considered as of the same force and effect as if the said affidavits respectively were the depositions of the several
231 affiants duly taken, each party reserving the right to except to the decision of the court on the said motion and on the said plea.

Dated New York, March 17, 1892.

EDW. MITCHELL, *U. S. Att'y.*
WINSLOW S. PIERCE,
Specially Appearing as Att'y for Def't.

The defendant, in support of its said motion and plea, then read two several affidavits of Charles E. Satterlee, as follows:

"United States Circuit Court, Southern District of New York.

INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles E. Satterlee, being duly sworn, says: That he is the secretary and treasurer of the Texas and Pacific Railway Company, and has been such since 1882. Deponent says that in the year 1886 the Texas and Pacific Railway Company was placed in the hands of receivers appointed by the circuit court of the United States for the western district of Louisiana. That said receivership was continued under proceedings to foreclose several of the mortgages of the said railway company during the years 1886, 1887 and 1888. That the receivers so appointed were John C. Brown and Lionel A.
232 Sheldon. That subsequently to such appointment one of the receivers, Lionel A. Sheldon, resigned, and John C. Brown remained the sole receiver of said railroad and property until the termination of the receivership in October, 1888. That the general offices of said receivers were by them established and maintained throughout the period of said receivership at the city of Dallas, in the State of Texas. That upon the termination of said receivership the railroad and property of the said Texas and Pacific Railway Company was restored to that company, and until the present day the said Texas and Pacific Railway Company has and maintains its general or principal offices in the city of Dallas, in the State of Texas.

That prior to the year 1889 the city of Marshall, Texas, claimed that the Texas and Pacific Railway Company had entered into an engagement or contract with the said city to maintain its offices, machine shops, &c., in said city of Marshall. That at the time of the appointment of said receivers there was pending in the circuit court of the United States for the eastern district of Texas a suit instituted by the city of Marshall to compel the removal of the offices of the Texas and Pacific Railway Company to said city of Marshall, and a mandatory injunction had been obtained requiring such removal and the maintenance of such offices, machine shops, &c., at the city of Marshall, which said injunction was continued as against said receivers. That the judgment in said suit requiring such removal and maintenance of said offices at Marshall was taken by writ of error to the Supreme Court of the United States. That in the year of 1889, the legislature of the State of Texas passed an act which was approved on the 27th day of March, 1889, requiring railway companies doing business within the State to maintain their general offices therein. Deponent prays that reference to said act may be had on the hearing of this application. That the
233 executive committee of the board of directors of the Texas and Pacific Railway Company, at a meeting held in the city of New York on the 15th day of July, 1889, adopted the following preamble and resolutions:

'Whereas, by an act of the Texas legislature, approved March 27, 1889, all railroad companies chartered by the State of Texas, or owning or operating any line of railway within the State, are required to keep and maintain permanently their general offices, machine shops, round-houses, &c., within the State at certain places, and to keep all books, accounts, &c., at said offices; and

Whereas, the Texas and Pacific Railway Company, without waiving any of its chartered or legal rights in the premises, is willing out of respect to the legislative expression of the State of Texas, to consider said act as applicable to it and to act accordingly; therefore

Resolved, That it is the purpose of this company fully to comply with said law in letter and spirit, and to that end the general manager of this company be and is hereby instructed to immediately make arrangements for the removal of the general offices now at Dallas to Marshall, Texas, and to establish at the said city of Marshall the following offices of this company, viz:

Office of vice-president.
General manager.
Chief engineer.
Secretary and treasurer.
Auditor.
General freight agent.
General passenger agent.
Superintendent of motive power and machinery.
Master of transportation.
Stock and fuel agent.
Claim agent.

and to have all the books and papers connected therewith kept in said general offices.'

234 That the said Texas and Pacific Railway Company was then in the possession of its railroad and property, and the general or principal offices of the said receivers which had been established at Dallas, Texas, as aforesaid, were continued as the general or principal offices of the said railway company. That when the said railway company in pursuance of the resolution hereinbefore recited, was about to remove its said offices to Marshall, Texas, it was prevented from doing so by an injunction obtained by certain citizens of the city of Dallas in one of the local courts restraining and prohibiting such removal. That said injunction was continued upon final hearing, and pending the appeal thereof the Supreme Court of the United States decided the said case of The City of Marshall *vs.* The Texas and Pacific Railway Company adversely to the city of Marshall.

The opinion of the court in that case is found in vol. 136 of the U. S. Supreme Court Reports. The said railway company has ever since continued to maintain, and now does maintain, its general or principal offices at said city of Dallas.

Deponent says that the only office maintained by the defendant railway company in the city of New York consists of two rooms at 195 Broadway, in said city. That the president, one of the vice-presidents, and this deponent, the secretary and treasurer, are the

only officers of the said company who reside in the city of New York, or who have any office in said city connected with the affairs of the said railway company, except a freight agency at 321 Broadway, in charge of a general eastern agent. Said office of the company in the city of New York is also known as the transfer office of the said railway company, and transfers of the stock of said company may be made at said office.

That the general or principal offices of the Texas and Pacific Railway Company located at Dallas, Texas, consist of the offices of the heads of all departments of the said railway company, namely:

The general management, covering the operation of the road
235 and transportation of freight and passengers; the accounting department; the legal department for the State; the land and tax department, and the supply department; and that at said general offices at Dallas, Texas, the offices of the following officers and agents of the said railway company are maintained, namely: Third vice-president; general manager; the auditor, the general freight agent; the general passenger agent; the land and tax commissioner; the assistant secretary and treasurer; master of transportation; general attorney for the State of Texas; and other subordinate officers and agents of said railway company, and that all the books and papers and vouchers connected with said offices are kept at said offices and the revenues from the railroad and property of the said railway company are there received and disbursed. That the disbursements of the said railway company in the city of New York are made almost exclusively out of remittances received from the general offices of the company at Dallas, and extend only to the payment of interest upon the bonded debt of the said railway company and incidental disbursements, including expense of maintaining said New York office. The disbursements made by this deponent as treasurer of the company, are reported monthly to the auditor, and the vouchers covering such disbursements are transmitted to him with such monthly reports and kept in his office at Dallas; and all journal entries connected with the transactions of the New York office are transmitted to the auditor for entry upon the general books of the company which are kept in his office.

That the Texas and Pacific Railway Company has 336 miles of road in the State of Louisiana, making a through line from New Orleans to the Texas State line, and thence to El Paso, in the State of Texas. The accounting, covering all of the operations of the said railway company and all its property in the State of Louisiana, is

had at the general offices of the railway company at Dallas,
236 and the officers of the said railway company at Dallas are in charge and control of these matters.

Deponent states that the defendant railway company is a corporation organized under the laws of the United States, and prays upon the hearing herein that reference may be had to its charter and to the laws of the State of Texas affecting the said railway company. That the annual meeting of the stockholders of the defendant railway company is held in the city of New York, and an adjourned meeting of said stockholders is held at the general offices of the

company at Dallas. That is so in respect to the annual meeting of the board of directors as well. That the meetings of the executive committee of the board are usually held in the city of New York. These meetings are infrequent, averaging, say, two to four in a year.

(Signed) C. E. SATTERLEE.

Sworn to and subscribed before me this 8th day March, 1892.

[SEAL.] E. A. JACKSON,
Notary Public.

United States Circuit Court, Southern District of New York.

INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

237 Charles E. Satterlee, by way of an addition to his affidavit, sworn to on the 8th day of March, 1892, being duly sworn, says: That he is the secretary and treasurer of The Texas and Pacific Railway Company, defendant in this proceeding. That said railway company has for some time past been constructing a large and commodious building of brick and stone, about 30 by 120 feet and five stories in height, for its general or principal offices at Dallas, Texas, which is now about completed. That this affiant is in possession of a photograph thereof, the size of which makes it inconvenient to attach it to this affidavit, but affiant now offers to exhibit the same to the counsel for the complainant, and prays that he may have leave to exhibit the same to the court on the hearing of the motion to dismiss this cause. Affiant further says that the reports of the Texas and Pacific Railway Company for the years 1889 and 1890 bear the words, "General offices, Dallas, Texas." Copies of said reports are hereto attached, marked respectively Exhibits A and B. Affiant would also call attention to statements in said reports Exhibits A and B of the general expenses (being statement No. 15 on each of said reports), which show the total cost of expense of carrying on the principal or general offices at Dallas, Texas, wherein the expense of maintaining the office in New York is a separate charge.

(S'g'd) C. E. SATTERLEE.

Sworn to before me this 11th day of March, 1892.

(S'g'd) E. A. JACKSON,
[SEAL.] *Notary Public.*"

238 And the affidavit of George J. Gould as follows:

Circuit Court, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George J. Gould, being duly sworn, states as follows:

That the Texas and Pacific Railway Company duly accepted the act of the legislature of the State of Texas, passed May 2, 1873, entitled "An act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage a speedy construction of a railway through the State to the Pacific ocean," as appears by resolution of the board of directors of said railway company, copy whereof is attached hereto.

That the traffic department of the defendant, The Texas and Pacific Railway Company, and all offices connected therewith (except the offices of local freight agencies), are located within the State of Texas, and none of the officers whose duty it is to fix rates of the character specified in the petition, and in Exhibit 36 thereto attached, upon the Texas and Pacific railway either alone or in connection with other railways and steamship lines, reside in or have offices in the State of New York, or in the second judicial circuit; and none of the books, papers, vouchers or data of any description constituting or affecting the defense of the railway company
239 in this proceeding are located or kept within this jurisdiction, but the same are located and kept at the general offices of the company at Dallas, Texas.

(S'g'd) GEORGE J. GOULD.

Sworn to and subscribed before me this 17th day of March, 1892.

E. A. JACKSON,
[SEAL.] *Notary Public, N. Y.*

And thereupon the complainant read, in opposition to said motion and plea, the affidavit of John D. Kernan in words and figures as follows:

Circuit Court of the United States, Southern District of New York.

INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

STATE OF NEW YORK,
City and County of New York, } *ss:*

John D. Kernan, being duly sworn, says: That he is one of the counsel for the Interstate Commerce Commission; that it is claimed by the complainant that the principal office of the said defendant

within the meaning of section 16 of an act to regulate commerce, as amended March 2, 1889, is in the Western Union building, at No. 195 Broadway, in the city of New York, because of the following facts:

1. That the United States Statutes incorporating the road (16 St. at Large, p. 574, &c., and 17 do., p. 59) have no provision as
240 to where principal office shall be, and provides that the first meeting to organize, &c., shall be held in New York city.

2. That the New York office is the place where the annual meeting of stockholders for the election of directors is, and for many years past has been, held; said meetings are held biannually; that at the election there held by stockholders for the purpose aforesaid in March, 1889, and at the meeting of stockholders so held in March, 1891, there were elected as directors of the company for two years persons whose names and residences appear in the printed reports for 1889 and 1890, attached to moving affidavit.

3. That, as will be seen above, ten of the fifteen directors of the company at all times are residents of the city of New York.

4. That substantially all of the meetings of the board of directors for the transaction of the business relating to the company are held at said office in the city of New York.

5. That in the absence of the board of directors the powers of the board are, under the by-laws of the company, vested in an executive committee of five members, all of whom are directors residing in the city of New York as aforesaid, and the meetings of the said executive committee are held, as aforesaid, at the office of the company in the city of New York; that no meeting of the stockholders or of the board of directors or of the executive committee are held in Texas except when the biannual stockholders' meeting, where directors are elected, in the city of New York is adjourned to meet in Texas; that said adjourned meeting in Texas is merely formal and no business of consequence is done thereat; that but one meeting of the board of directors was held in Texas last year, and that was an adjourned meeting held at the same time that the ad-
241 journed stockholders' meeting was held; that no stockholders, substantially, were present at said adjourned meeting in Texas, except by proxy, and no majority or quorum of the board of directors was present; that during the past two years no meeting of the board of directors or of the executive committee has been held in Texas, or otherwise than at the New York office aforesaid, where the majority of the board or of the executive committee, were present, or transacted business; that the object of holding an adjourned meeting of stockholders and of the board of directors in Texas, as aforesaid, is to comply with the statutes of Texas, which require the board to meet in such State at least once a year, &c. (Sayles' Texas Civ. St., sec. 4115.)

6. That during the time that the executive office of the company was at Philadelphia, Pennsylvania, Thomas A. Scott, of Philadelphia, Pennsylvania, was president of the company; that during the time that the principal office of address was at St. Louis, the first,

second and third vice-presidents of the company all resided there; that since 1887 the president and first vice-president has resided in New York, and have had their office at said 195 Broadway; that, as will be observed, a distinction between the general or principal office (singular) and the general or executive offices (plural) has always been observed.

7. That the said New York office is the office of Jay Gould, president, of George J. Gould, first vice-president, and of C. E. Satterlee, the secretary and treasurer of the company; that annual reports of the condition and operations of the company are prepared at said New York office, and there dated and issued to the stockholders under the hand of the president of the company; that the statement in said reports for 1888, 1889 and 1890, as to the
242 offices of the company, is as follows: "General offices, Dallas, Texas; New York office, 195 Broadway, N. Y."

8. That the books of minutes of both stockholders' and directors' meetings are kept by the secretary and treasurer of the company at the said New York office; that the stock certificate books are kept at the New York office, and all certificates of stock are there issued; that weekly reports of the receipts and disbursements are sent to the secretary and treasurer at the said New York office, and are there kept by him in appropriate books; that, in addition thereto, monthly reports thereof are sent to the president at the said New York office; that it is true that the general or executive offices of the company are at Dallas, Texas; that in such offices the orders and directions of the president, and, in his absence, the first vice-president, and of the board of directors and the executive committee of the company are carried out by the different executive departments there located, and the books relating to such operations so carried out are there kept—such offices being, in a word, the offices of the different executive departments charged with the duty of carrying on the operations of the road, subject to the direction and control, as aforesaid, of the president, first vice-president, board of directors and executive committee, located, as aforesaid, in the city of New York.

That the act of the Texas legislature of March 27, 1889, requiring railroads to keep and maintain its general offices, shops, &c., within the State of Texas, on its line and to keep there certain officers, to wit, president or vice-president, &c., or some one to perform the duties thereof, obviously used the words "general offices" in the sense of executive offices, as aforesaid.

In pursuance thereof, the defendant, under the resolution contained in the moving affidavit, put into the office of third vice-president, John A. Grant, theretofore and since, the general
243 manager of the company, located at Dallas, Texas; that an assistant secretary and treasurer was also appointed and has since so acted at Dallas, Texas; that no other changes were made, or have taken place in reference to the offices of the company under the said act of March 27, 1889; that all of the other executive agents of the company, as auditor, &c., had long prior thereto been, as is usual and necessary, located in Texas, where the plant of the com-

pany is situated and operated; that the foregoing facts are stated by deponent on information and belief, and are derived from the statutes of the United States and Texas, from the printed reports issued to stockholders by the president, as aforesaid, and from an interview held recently with Mr. Satterlee, the secretary and treasurer of the company, at which the counsel of the company was present; that at the same interview Mr. Satterlee admitted that Poor's Manual is a leading authority for information as to railroad facts and statistics published in the United States; that in the report for 1891, it is stated as follows: "Executive offices, Dallas, Texas; general office, 195 Broadway, New York, N. Y.;" that the said reports are based upon information furnished to those who issue said manual by the railroads themselves, either in the form of blanks furnished to the railroad companies and filled up by them, or taken from the annual reports made to stockholders by the presidents of such companies; that at the said New York office, the said Poor's Manual is subscribed for and taken by the company; that at said interview with the secretary and treasurer of the company, Mr. Satterlee, deponent called his attention to the foregoing statement made in Poor's Manual for 1891, and in reply thereto Mr. Satterlee said that he had but recently noticed that statement contained in Poor's Manual and that it was wrong and a mistake, and that he could not understand how it had occurred; that upon enquiry at the office of Poor's Manual, deponent was advised that they
244 had followed, since 1888, their publication as to the question of offices, issued prior to 1888; also that in one report only, made by the company since 1883, had it been stated that the principal office was at Dallas, Texas, and that Poor had not used the same.

Deponent calls attention to the fact that the defendant, as a subscriber to said Poor's Manual, has permitted and allowed the statement to be therein made that the executive offices of the company are at Dallas, Texas, while its central office is in New York, as aforesaid.

That beginning in 1871, when the company was organized, the following are the statements to be found in said Poor's Manual, as to the offices of the company:

Date.

1871–'2. Principal office and address, corner Warren and West streets, New York.

1872–'3. Principal office and address, 20 Exchange Place, New York.

1873–'4. Principal office and address, 20 Exchange Place, New York.

1874–'5. Principal office and address, 20 Exchange Place, New York.

1875–'6. Principal office and address, 20 Exchange Place, New York.

1876–'7. Principal office and address, Marshall, Texas,
Executive office, 275 South street, Philadelphia, Penn.

Date.

1877–'8. General offices, Marshall, Texas.
Executive office, Philadelphia, Penn.
New York transfer office, No. 50 Exchange Place, New York city.
1878. Same.
1879. Principal — and address, Marshall, Texas.
Executive office, 275 South Fourth street, Philadelphia, Pa.
1880. Same.
Transfer office, Farmers' Loan and Trust Company, New York.

245

1881. Same.
1882. Principal office and address, St. Louis, Mo.
General offices 195 Broadway, New York.
1883. Same.
1884. Same.
1885. Executive offices, St. Louis, Mo.
1885. General office, 195 Broadway, New York.
1886. Receiver, Brown & Co., Dallas, Texas.
Jay Gould, president, New York.
Executive offices, Dallas, Texas.
General office, 195 Broadway, New York.
1887. Same.
1888. Same.
1889. Same.
1890. Same.
1891. Same.

JOHN D. KERNAN.

Sworn to before me this 16th day of March, 1892.
SETH SPRAGUE TERRY,
Notary Public, N. Y. Co.

246 And thereupon Hon. John F. Dillon and Winslow S. Pierce, Esq., counsel for defendant, made argument in support of defendant's said motion and plea, and Hon. Edward Mitchell, United States attorney, and Hon. John D. Kernan made argument in opposition thereto, and the court having taken the same under advisement and consideration, afterwards and on the fourth day of April, 1892, rendered its decision and opinion as follows:

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

WALLACE, *J.*:

The question in this case is whether the principal office of the defendant is at the city of New York within the meaning of section

16 of the act of Congress commonly known as the interstate commerce act. That section confers jurisdiction upon the circuit courts of the United States to enforce any lawful order of the Interstate Commerce Commission, and in that behalf authorizes the commission to apply in a summary way by petition to the circuit court sitting "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement may happen."

The defendant is a corporation created by an act of Congress, and operates a railroad in the States of Louisiana and Texas. The act of incorporation does not prescribe where the principal
247 office shall be kept. If the office where the president, the first vice-president and the secretary and treasurer have their business domicile, where the regular meetings of the stockholders, the board of directors and the executive committee are held, where certificates of stock are issued and registered upon the books, and where the profits, if any are earned, are received and distributed to the stockholders, is the principal office of the corporation, instead of that place where the subordinate officers and agents of the corporation who are in charge of the operating, traffic and accounting departments of its business, discharge their duties—the New York office is the principal office.

The principal office of the corporation is commonly understood to be its chief office or head office—the office at which its most important affairs are regulated and controlled. I conclude that the New York office is the principal office of the defendant within the meaning of the statute.

The statute intends to lodge the power of enforcing any lawful order of the commission with that particular circuit court which can most effectually compel obedience to its process in the particular case. Obedience to the order of the court is to be enforced by attachment of the directors, officers or agents of the corporation, or by any other process incident or applicable to writs of injunction. In cases of disobedience process of attachment would ordinarily be most effectual against the chief executive officers of the corporation, and there would seem to be more propriety in directing such process to them than to the subordinate agents. These officers are ordinarily to be found at the head office of the corporation. The plea is overruled.

To which decision and opinion and the several rulings therein contained defendant then and there duly excepted, and especially to the ruling in said opinion to the effect that the principal office of defendant is in the city of New York, defendant then and there duly excepted.

248 And afterwards and on the 15th day of April, 1892, the court made and entered its order and decree as follows:

"At a term of the circuit court of the United States for the southern district New York, held at its rooms in the post-office building in the city of New York on the fifteenth day of April, 1892.

Present: Hon. William J. Wallace, circuit judge.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Defendant's motion to dismiss this proceeding for want of jurisdiction and its plea in abatement having come on to be heard together upon the several affidavits of Charles E. Satterlee, George J. Gould and John D. Kernan, heretofore filed, and the stipulation of the parties to this proceeding relating thereto; and the court having heard Hon. John F. Dillon and Winslow S. Pierce, Esq., counsel for defendant, in support of said motion and plea, and Hon. Edward Mitchell, United States district attorney, and Hon. John D. Kernan, counsel for complainant, in opposition to said motion and plea, and due deliberation having been had, it is—

Ordered, that defendant's said motion to dismiss this proceeding for want of jurisdiction be and the same hereby is denied, to which order the defendant then and there excepted; and it is—

249 Ordered, adjudged and decreed, that defendant's said plea in abatement be overruled, to which ruling the defendant then and there excepted.

Further ordered, that defendant have until the next rule day to serve its answer to the petition of complainant herein.

(S'g'd) W. J. WALLACE."

To which order and decree and the several rulings therein contained defendant then and there duly excepted.

And counsel for defendant now tender this their bill of exceptions in open court, and pray that the same may be signed and sealed by the court and ordered to be filed and made a part of the record in this proceeding—all of which is accordingly done as prayed for at the term aforesaid on this 6th day of May, 1892.

(S'g'd) WM. J. WALLACE.

No objection as to matter or form.
May 6, 1892.

EDWARD MITCHELL,
U. S. Attorney.

250 Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

It is hereby stipulated and agreed by and between the parties to this proceeding that Exhibits A and B, being the annual reports of the directors of the Texas and Pacific Railway Company for the years 1889 and 1890, attached to the affidavit of Charles B. Satterlee, verified March 11, 1892, used on the part of defendant on the hearing of the motion to dismiss this proceeding and plea of abatement, may not be incorporated in the bill of exceptions nor printed,

but that the same, or any part thereof may be produced and referred to by either party whenever deemed necessary in this court or any appellate court to which this proceeding may be appealed.

Dated New York, May 6, 1892.

(S'g'd) EDWARD MITCHELL,
U. S. Attorney, for Complainant.

(S'g'd) WINSLOW S. PIERCE,
Attorney for Defendant.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Interstate Commerce Commission *vs.* The Texas and Pacific Railway Co. Bill of exceptions. Winslow S. Pierce, att'y for def't, 195 Broadway. U.S. circuit court. Filed May 6th, 1892. John A. Shields, clerk.

251 In the Circuit Court of the United States for the Southern District of New York. In Equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

The answer of The Texas and Pacific Railway Company, respondent, to the petition or bill of complaint filed against it in the above styled and numbered suit.

This respondent now, and at all times hereafter, reserving all manner of benefit and advantage to itself of its plea to the jurisdiction of this court heretofore made, and all manner of benefit and advantage to itself of exception to the many errors and insufficiencies in said petition or bill contained for answer thereto, or to so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

I.

This respondent says that the said complainant, styled in said petition "The Interstate Commerce Commission" has not capacity or legal faculty to bring and maintain this proceeding or to sue in said name and style of The Interstate Commerce Commission,
252 for that said complainant, as such commission, is not a corporation, person or body politic capable of suing or being sued as such commission and independently of the members composing such commission, and the said defendant doth claim the same benefit of the said objection to the said complainant's want of capacity or faculty to sue, bring or maintain this proceeding as if defendant had demurred to the said petition on said ground, and humbly prays the judgment of this honorable court whether it shall make any other or further answer to said petition than as aforesaid.

II.

For further answer to said petition the defendant company, by protestation, not confessing or acknowledging all or any of the

matters and things in the petition of the complainant to be true in such manner and form as the same are therein set forth and alleged, answering said petition shows to the court that the complainant has not in and by its said petition made or stated such cause as entitled it to any discovery, answer or relief touching the matters which it alleges of or against this defendant.

That the said petition shows no capacity and faculty of the complainant herein to sue or to bring or maintain this proceeding.

That the petition fails to allege or show any facts constituting any violation by this defendant of the order of the said Interstate Commerce Commission, alleged in said petition to have been made on the 29th day of January, 1891, and said petition does not show or allege any specific act or acts of the defendant in violation of disobedience of the act of Congress of the United States, entitled "An act to regulate commerce," or of any of the amendments thereto.

That said petition does not allege or show any violation or disobedience by the said defendant railway company of any lawful order of the said Interstate Commerce Commission.

253 And the defendant claims the same benefit of the said objections to the said petition as if the same had been presented by demurrer thereto, and asks the judgment of the court whether it shall make answer to said petition otherwise than as aforesaid.

III.

For further answer to the said petition, the defendant company, by protestation, not confessing or acknowledging all or any of the matters and things in the petition of the complainant to be true in such manner and form as the same are therein set forth and alleged, answering said petition, shows to the court as follows:

Defendant shows that the petition of the complainant charges that this defendant has violated and disobeyed, and continues to neglect and refuse to comply with, a certain order made by the Interstate Commerce Commission in this: that said defendant, since the issuance and service of said order, charges, demands, collects and receives freight rates which have been declared to be unlawful in and by the said order of the said commission; and by way of specification of the violations complained of, complainant attaches to its petition, as "Exhibit 36," a table alleged to have been correctly compiled from the official tariff sheets of this defendant, and by it filed in the office of the Interstate Commerce Commission, as required by the said act to regulate commerce, showing, as complainant alleges, that defendant as to charges for through freight and as to the divisions thereof for ocean and inland carriage, destined inland through the port of New Orleans, in the State of Louisiana, and the freight rates to the same inland points on domestic traffic originating at said port, are not in conformity with said order, but on the contrary a willful disobedience thereof.

Defendant shows that in and by the petition and said "Exhibit 36" thereto, it appears, and the fact is, that the rates com-

254 plained of (including both of said classes of rates, viz: through rates for business carried from a foreign point through the

port of New Orleans to a point of destination in the United States, and inland rates from the port to the same point of destination), are, so far as they are made for inland carriage, the joint rates over the Texas and Pacific railway and the Southern Pacific railway, and cover carriage by the rails of this defendant from New Orleans, Louisiana, to El Paso, Texas, and by the rails of said Southern Pacific Company from El Paso to San Francisco, California.

Defendant shows that a revision of through rates as required by said order of the commission could not be made by this defendant without the consent and participation of said Southern Pacific Company, and that any order or decree of this court requiring defendant to desist from carrying business upon said joint rates would abrogate contracts and agreements to which the said Southern Pacific Company is a party. Defendant therefore shows and avers that the Southern Pacific Company is a necessary party hereto, and inasmuch as said Southern Pacific Company is not, and has not been made, a party herein, alleges that there is in this respect a defect of parties, and upon this ground prays that the petition may be dismissed with costs to it; and defendant prays the same benefit and advantage of this objection as if the same had been taken by demurrer.

IV.

This respondent admits that it is a corporation chartered and existing under and by virtue of the laws of the United States, as alleged in plaintiff's bill, but it expressly denies that its principal office is in the city of New York, in the State of New York. On the contrary, this respondent says that its principal office was, at the time of the filing of this bill and long prior thereto, and is at this time, in the city of Dallas, Dallas county, Texas. This respondent
255 admits that on April 23, 1890, in compliance with the order mentioned in complainant's bill, it filed its answer to the complaint filed against it before the said commission, and that the copy of said answer marked Exhibit 33 in complainant's bill is a true and correct copy of said answer. That with respect to the parties to said proceeding, the nature of the pleadings and the evidence brought before said commission by said parties, respondent says it is without information, and therefore neither admits nor denies the truth of the allegations in said bill and exhibit in regard thereto.

V.

Respondent admits that the Interstate Commerce Commission made an order dated on the 29th day of July, 1891, set forth in the petition herein, and that it (said defendant) received notice of the same; but respondent avers that the aforesaid order of the said commission was not a lawful order and is not one which this respondent is or was bound to respect and obey.

VI.

Respondent admits that it now charges, demands, collects and receives, and has since the date of the alleged order of said commission of January 29, 1891, charged, demanded, collected and received rates for the transportation of commodities from Liverpool and London, England, via New Orleans and the Texas and Pacific railway and the Southern Pacific railway to San Francisco, California, and also from New Orleans, via same route to the same destination, substantially as stated in Exhibit 36 to the bill of complaint. But it denies that in so doing it violated the act to regulate commerce, approved February 4, 1887, or amendments thereof or any law of the United States, or any lawful order of the said Interstate Commerce Commission; and especially does it deny it
256 violated the first clause of the third section of said act set forth by the commission in its opinion, as follows:

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Respondent avers that rates for the transportation of the commodities named in said Exhibit 36, from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamship and sailing vessels in connection with railroads across the Isthmus of Panama; by steamship and sailing vessels from Europe to New Orleans, connecting there under through arrangements with the Southern Pacific Company to San Francisco, none of which, unless it be the Southern Pacific Company, are in any respect subject to the "act to regulate commerce," nor to the jurisdiction and control of said Interstate Commerce Commission. Respondent avers that unless it charge substantially the rates specified in said Exhibit 36, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transporation of property and import traffic from London and Liverpool, England, to San Francisco, California, would be driven from that business, and would lose the revenue derived by it therefrom, which is considerable, and is important and valuable to it, as shown by the fact, which it avers, that the property in the transportation of which it participated from foreign countries, via the port of New Orleans to San Francisco, California, was, during the year 1891, 8,165,000 pounds. And the respondent says that the rates aforesaid are not to the prejudice or disadvantage of
257 New Orleans, and works no injury thereto, because if it was denied the right to participate in said traffic such traffic would move, via the routes and lines aforesaid without benefit to New Orleans, but on the contrary to the disadvantage of said port

to the extent that it could be carried by other routes instead of through that port. And furthermore, respondent says that the traffic aforesaid is upon orders by persons, firms and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool and other European markets, and if the alleged order of said commission was carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event.

VII.

Respondent further says that while the specific allegations of said bill of complaint relate only to rates on commodities from Liverpool and London, England, via New Orleans to San Francisco, and from New Orleans to San Francisco, the alleged order, and the relief prayed, affect other and very considerable part of respondent's import traffic, to wit:

(*a.*) Respondent says that prior to and during a part of the year 1891, it had in effect to Memphis, Saint Louis, Kansas City, and other Missouri River points, rates on tin plate, earthenware and other commodities, from Liverpool and London, England, and other European points, of which its proportion was not in each instance the same as the inland rate from New Orleans to such points of destination, under which it transported traffic during the year 1891 to the amount of 17,242,632 pounds, at a substantial profit; that the rates between London, Liverpool and other European points to Missouri River points and points of destination aforesaid, were established and fixed by steamship and sailing vessels across
258 the Atlantic to New Orleans, and thence by water carriers on the Mississippi and Missouri rivers, and also by steamship and sailing vessels from European points to Baltimore, New York, and other Atlantic ports, between which rates are lower than the ocean rates between European ports and New Orleans and thence in connection with rail lines. Respondent says, that by reason of the fact that its empty-car movement is principally north and westward from New Orleans, it was greatly to its interest to transport the traffic aforesaid, and upon such reasonable terms as might be necessary to secure it. But notwithstanding this fact, respondent says, that the rates from European points by Atlantic ocean carriers and Mississippi River carriers and by ocean carriers between European points and Atlantic ports, became so low that it felt compelled, in a measure, to abandon the business. Respondent avers that as late as February 15, 1892, responsible steamship lines in Europe were quoting the following rates from Liverpool, via Atlantic ports to the points named:

	Tin plate.	Earthenware.	Cement.	Beer.
Kansas City,	31 cents.	35 cents.	31 cents.	35 cents per 100 lbs.
Omaha,	43 "	46 "	43 "	48 " " "
Saint Louis,	26 "	37 "	26 "	31 " " "

That by reason of the low rates resulting from the competition aforesaid, respondent on January 12, 1891, canceled its tariffs from

European points to Missouri River points on tin plate, and has from time to time since then, canceled all its other tariffs between said points, and now charges on such business as it receives destined from European points to Missouri River points, the local rates from New Orleans, but the aforesaid competitive rates being lower, it enjoys but little of such traffic. Respondent avers that the importation of property from European points to Missouri River points is a very large traffic, and at remunerative rates is very desirable; that the conditions affecting same vary and fluctuate frequently,
259 and at times respondent has been, and will doubtless be able in the future to engage in such traffic at profitable and remunerative rates if allowed to meet the competition which fixes said rates, and without any injury or prejudice to the ports of New Orleans, or any other locality. But respondent says that the present local rates from New Orleans to that territory are as low as existing circumstances and conditions will allow. And if compelled to charge such rates, instead of meeting the varying conditions aforesaid, it will be prevented from engaging, to any considerable extent, in said competitive traffic at any time, to its great loss and injury, and without benefit to any one except its competitive carriers aforesaid, many of which are not subject to the act to regulate commerce, or other laws of the United States.

(*b.*) Respondent says that there are large shipments of cement from European points to Texas points, and especially to Dallas, Fort Worth, Sherman and other north Texas cities, where large quantities of cement are used; that the ocean rates on cement from European points to the port of Galveston, Texas, are substantially the same as the rates thereon to the port of New Orleans, and especially during the cotton-shipping season, when large numbers of irregular ships go to Galveston for cotton; that the local rates from the port of Galveston to Texas points, in accordance with long-established differentials, by reason of the shorter distance, are less than from the port of New Orleans, the rate on cement to Dallas, Fort Worth, Sherman and other north Texas cities being eleven cents less from Galveston than from New Orleans, and the difference is greater to points nearer to Galveston; that by reason of these conditions, cargoes of cement to the Texas market generally go to Galveston instead of to New Orleans by ocean carriers not subject to the act to regulate commerce, and is there reshipped over rail lines wholly within the State of Texas, and in respect to such shipments not subject to said act to points of final destination within
260 said State. Respondent further avers that large quantities of cement from European points are used in Denver, Pueblo, Trinidad and other Colorado points, to which, for the same reasons affecting Texas points, the local rates are five cents per hundred pounds less from Galveston than from New Orleans. Respondent avers that this traffic is of great importance and amount, and it can engage in the same to meet the rates fixed by the conditions aforesaid, and get a fair share of the traffic at a substantial profit, unless prevented by the order of the Interstate Commerce Commission and this court; that in so doing no injury will result to the interests of

New Orleans, but on the contrary the cement dealers of that city can, and will, handle their share of the traffic through the port of New Orleans instead of through the port of Galveston, as they are now in effect required to do in order to share the business.

(*c.*) Respondent says that large quantities of foreign tin plate and earthenware are demanded by the market and used in the State of Texas, and the same is imported from European points to supply such demand; that the ocean rates thereon from European points to the port of Galveston, Texas, are substantially the same as to the port of New Orleans; that the local rates from the port of Galveston to Texas points, in accordance with long-established differentials, by reason of the shorter distance are less than from the port of New Orleans; that by reason of these conditions, tin plate, earthenware and other articles of import traffic of more or less importance and value are carried to Galveston by ocean carriers not subject to the act to regulate commerce, and is reshipped over rail lines wholly within the State of Texas, and in respect to such shipments, not subject to said act, to points of final destination within said State. And respondent further avers that large quantities of cement, earthenware and other articles of import traffic from European points are used in Denver, Pueblo, Trinidad, and other Colo-
261 rado points, to which, for the same reasons affecting Texas points, the local rates are less from Galveston than from New Orleans. Respondent avers that this traffic is of great importance and amount, and it can engage in the same and meet the rates fixed by the conditions aforesaid, and get a fair share of the traffic at a substantial profit unless prevented by the order of the Interstate Commerce Commission and this court; that in so doing no injury will result to the interests of New Orleans or to its citizens, nor to any persons or interests, except the ocean and competitive carriers aforesaid.

Respondent further says that there are many other articles of import traffic shipped from foreign countries upon through bills of lading, and destined to places within the United States, not hereinbefore mentioned or specified, that are affected by substantially the same circumstances and conditions as hereinbefore set forth. And respondent says that if, as prayed by complainant in this case, it is restrained and prevented from meeting said competitive rates, it will suffer a great loss and injury, in addition to the cases hereinbefore set forth by way of instance and illustration. And this respondent denies all unlawful combination in said bill charged, without that any other matter or thing material for it to make answer to and not herein sufficiently answered, avoided or denied, is true to the knowledge and belief of this respondent. All which matter and things this respondent is ready to aver and prove, as this court shall direct, and it prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

WINSLOW S. PIERCE,
Sol. for Def't.

JOHN F. DILLON, *Of Counsel.*

262 STATE OF NEW YORK, }
City and County of New York. }

I, E. H. Hinton, being duly sworn, make oath that I am the general freight agent of the defendant The Texas and Pacific Railway Company in above answer; that I am acquainted with the statements as set forth in said answer, and that the statements therein contained made upon knowledge are true, and those made on information and belief *he* believes to be true.

E. H. HINTON,
Gen. Fr't Agent the Tex. and Pac. R'way Co.

Sworn to and subscribed before me this 2d day of June, 1892.
E. A. JACKSON,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) U. S. circuit court, southern district of N. Y. The Interstate Commerce Commission, complainant, against The Texas & Pacific Railway Company, defendant. Amended answer. Winslow S. Pierce, sol'r for defendant, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Oct. 4, 1892. John A. Shields, clerk.

263 United States Circuit Court, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION }
against
THE TEXAS AND PACIFIC RAILWAY COMPANY. }

WALLACE, *J.*:

This is an application to enforce an order of the Interstate Commerce Commission, January 29, 1891, in a proceeding instituted by the New York Board of Trade and Transportation. The petition in that proceeding complained of unjust discrimination made by various railway carriers. The defendant was duly notified of the complaint, and appeared in the proceedings and submitted its rights. It was shown to the commission, as appears by the findings of fact in their report, that the defendant, in conjunction with the Southern Pacific Railway Company, made joint rates from New Orleans to San Francisco covering carriage of traffic by the rails of the defendant from New Orleans to El Paso and thence by rails of the Southern Pacific Railway Company to San Francisco, and also made joint rates with vessel-owners in London and Liverpool covering carriage of traffic from those places to San Francisco, via New Orleans. It was also shown that the ordinary tariff rates charged by the two companies upon traffic delivered to the defendant at New Orleans and shipped at New York, Chicago and other places in this country for carriage from New Orleans to San Fran-
264 cisco, were somewhat more than double the rates charged for carriage of similar traffic sent from Liverpool or London by through bill of lading to San Francisco, via New Orleans. To

illustrate: it was shown that the rates made by the two companies, in conjunction with Liverpool vessel-owners, by their bills of lading from Liverpool to San Francisco by the rails of the defendant from New Orleans to El Paso, were per hundred pounds on books, on carpets and on cutlery, $1.07, while the regular tariff rates of the two companies upon the articles when sent to New Orleans from other places in this country were per hundred pounds on books, $2 64; on carpets, $2.88; and on cutlery, $3.26; and that the rates on these articles when shipped from Liverpool were 80 cents per hundred pounds for carriage from New Orleans to San Francisco. The defendant contended that it was justified in making the discrimination between the foreign and the domestic traffic, because, owing to the competition of sailing vessels and foreign carriers between Liverpool and San Francisco, it could not get any appreciable amount of foreign traffic without meeting the competitive rates by making the rates given. The commission, while conceding the facts to be as asserted by the defendant, ruled against the validity of the excuse, and made an order which in substance required the defendant to desist from carrying any article of imported traffic shipped from any foreign port upon through bills of lading destined to any place within the United States at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic. It is admitted by the answer of the defendant that since the order of the commission was made it has maintained a substantially similar disparity in its transportation rates for these articles as well as in those for the transportation of numerous other articles depending upon the foreign or domestic origin of the shipment. The defendant insists that its action in this regard is not prohibited by the provisions of the
265 interstate commerce act, and that as it has not been guilty of any unjust discrimination within the meaning of that act, the order of the commission ought not to be enforced. It also insists that the proceeding is defective because the Southern Pacific Railway Company is not made a party to the defense. If the order made by the commission was a lawful one, I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Railway Company is not at present pursued. If the defendant is violating a proper order of the commission, it should be restrained from doing so, and it cannot escape upon the objection that another wrongdoer is also violating it. The real question, as it seems to me, is whether the existence of the peculiar facts which were relied upon before the commission by the defendant, as an excuse for its discrimination, justifies its conduct. It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are in effect fixed and controlled by the competition of sailing vessels between these ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the act to regulate commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for

reasons to which it is now unnecessary to revert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic by reason of the competition referred to and the revenue derived therefrom, unless it carries it at the lower rates, and by doing so is enabled to get part of it, which would otherwise go from London and Liverpool to San Francisco around the Horn, or by the Isthmus of Panama. The case presents a question of much interest and importance to the defendant, and carriers similarly situated, and also to our own merchants
266 and manufacturers who, in supplying the wants of consumers at places within the United States, have to meet the competition of foreign merchants and manufacturers and are placed at a serious disadvantage if they are compelled by the railway carriers to pay higher rates of transportation upon their goods. The question does not, however, seem to be such a doubtful one as to require more than a brief statement of the conclusions reached. The second section of the interstate commerce act prohibits unjust discrimination and declares that the common carrier charging a greater or less compensation for any service rendered in the transportation of passengers or property than it charges any other person for doing a like and contemporaneous service in the transportation of a "like kind of traffic under substantially similar circumstances and conditions," shall be deemed guilty of unjust discrimination. The third section provides that it shall be unlawful for the carrier to make or give any undue or unreasonable preference or advantage to any particular person, locality, or particular description of traffic in any respect whatsoever, or to subject any particular person or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The third section is substantially taken from the second section of the English act of Parliament known as the railway and canal traffic act of 1854.

Either section is sufficiently comprehensive in its terms to prohibit an interstate carrier from making an unfair discrimination between different shippers in charges for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. But neither section is intended to prohibit all discriminations or preferences. In considering whether an undue discrimination has been made, the fair interests of the carrier are to be taken into account, and although lower rates are to be given to one shipper or class
267 of shippers than to another for carrying the same kind of traffic, the latter have no just ground of complaint of unjust discrimination if the condition of the service enable the carrier to take the traffic of the former at a less cost; nor is the discrimination unjust if made conformably to some agreement by which the favored shipper gives the carrier an adequate consideration for the reduced rates. Upon this principle it was decided not to be an unjust preference under the English act for a railway company to carry at a lower rate in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real ob-

ject of the company was to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect might be to exclude from the lower rate those shippers who could not give such a guarantee (Nicholson *vs.* Great Western Railway Co., 4 C. B (N. S)., 366). The discrimination between different shippers is a lawful one if it is such as the carrier may fairly give because of the difference in cost, expense, or the exceptional character of the service (U. S. *v.* Del., L. & W. R. R. Co., 40 Fed. Rep., 101).

Prior to the enactment of the interstate commerce act the courts were of the opinion that discriminations by railway carriers in the rates of freight charged to shippers based solely on the ground of the quantity of the freight shipped, without reference to any conditions tending to decrease the cost of transportation, were contrary to sound public policy and inconsistent with the obligations of such carriers to the public (Hayes *vs.* Pennsylvania Co., 12 Fed. Rep., 309; Burlington Co. *vs.* Northwestern Fuel Co., 31 Fed. Rep., 652).

Yet it might well be that shippers would be induced to increase their traffic with a carrier by the offer of such discrimination, perhaps by withdrawing part of it from a rival carrier, perhaps by stimulating the shippers to enlarge his business operations, and thus the discrimination might be profitable to the carrier.

268 The English courts, in cases arising under the English traffic act, have held that preferences given to particular shippers to induce them not to divert traffic from the carrier or to induce them to transfer traffic to one carrier which otherwise would go to another carrier, are unlawful, and cannot be justified on the ground of profit to the carrier allowing them. (Harris *vs.* Cockermouth and Workington R'y Co., 3 C. B. (N. S.), 693; Evershed *vs.* The London and North Western R'y Co., 2 L. R., Q. B., 254.)

In the first of these cases the judges, in their opinion, pointed out that if they were to justify a discrimination upon such reasons, a railway company might in any case grant a preference to one person over another provided it acted *bona fide* in the belief that such a course would be to its advantage. In the second case the court in pronouncing against the validity of the justification used this language:

"We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless, at all events, there is a sufficient consideration for the reduction, which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic."

The interstate commerce act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely on the ground that unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them, unless given exceptional rates, to justify that one in making the discrimination in his favor on the ground of the necessity of the situation.

The order is granted.

(Endorsed:) U. S. circuit court, southern dist. of New York. The Interstate Com. Com. against The Texas and Pacific R'y Co. Wallace, J. U. S. circuit court. Filed Oct. 5, 1892. John A. Shields, clerk.

269 At a term of the circuit court of the United States for the southern district of New York, held at its rooms in the post-office building in the city of New York on the 3d day of June, 1892.

Present: Hon. William J. Wallace, circuit judge.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

This proceeding coming on for a hearing, and having been heard, after due legal notice to the parties, upon the petition, answer, amended answer, judgment overruling plea to jurisdiction, the report and findings and order of the petitioner, annexed to the petition as a part thereof, and the proofs and arguments by Edward Mitchell, Esq., Simon Sterne, Esq., and John D. Kernan, Esq., counsel for petitioner, and John F. Dillon, Esq., and Winslow S. Pierce, Esq., counsel for the defendant; and after due consideration thereof by the court, it appearing that the order of the petitioner drawn in question in this case is a lawful order and that the same has been disobeyed by the defendant;

Now, therefore, it is ordered, adjudged and decreed, that the prayer of the petition herein be granted and that an injunction issue in accordance with such prayer, restraining the defend-

270 ant from further continuing such disobedience of said order of the petitioner and perpetually enjoining the defendant, its board of directors, officers, agents, attorneys, clerks, servants, employees and all persons claiming or holding under them, or either, or any of them, from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination, or at any other than the same rates established in said published tariff for the carriage of other like kinds of traffic in the elements of bulk, weight, value and expense of carriage, or from carrying imported traffic at lower rates, for like service, than the defendant charges for like traffic originating in the United States, or from charging, or accepting for its share of through rates upon imported traffic a lower sum than it charges or receives for domestic traffic of like kind to the same destination from the point at which the imported traffic enters the country, or for such share of through rates upon imported traffic any other than the rates established in the defendant's published tariff for the carriage of other

like kind of traffic in the elements of bulk, weight, value, distances and expense of carriage.

Application for payment of costs and counsel fees to complainant may be made after the conclusion of these proceedings upon appeal or otherwise.

WM. J. WALLACE.

SIR: You will please to take notice that the annexed proposed order in the above-entitled action, with a copy of which you are herewith served, will be presented for settlement to Hon. William J. Wallace, circuit judge, at his chambers in Syracuse, N. Y.,
271 on November 9, 1892, at 10.30 a. m., or as soon thereafter as counsel can be heard.

Yours, &c., EDWARD MITCHELL,
United States Attorney in and for the Southern District of New York, Attorney for Petitioner.

Office and post-office address, United States post-office building, New York city, N. Y.

To Winslow S. Pierce, Esq., attorney for defendant.

(Endorsed:) U. S. circuit court for the southern district of New York. The Interstate Commerce Commission against The Texas & Pacific Railway Company. Order and notice of settlement. Edward Mitchell, United States district attorney in and for the southern district of New York, attorney for petitioner. Office & post-office address, United States post-office building, New York city, N. Y. Service of a copy of the within proposed order and notice is hereby admitted this 22 day of October, 1892. Winslow S. Pierce, att'y for def't. U. S. circuit court. Filed Nov. 26, 1892. John A. Shields, clerk.

272 At a term of the circuit court of the United States for the southern district of New York, held at its rooms in the post-office building in the city of New York on the 8th day of December, 1892.

Present: Hon. William J. Wallace, judge.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

On motion of Winslow S. Pierce, Esq., attorney for defendant, and after hearing Winslow S. Pierce and David D. Duncan, Esqs., in support of the motion, and John D. Kernan, Esq., in opposition thereto, it is—

Ordered, that all proceedings under the final order and decree entered herein be stayed, and that no injunction be issued under said order and decree until this proceeding shall have been finally decided upon appeal in the circuit court of appeals for the second circuit.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The Interstate Commerce Commission, plaintiff, against The Texas & Pacific Railway Co., defendant. Order staying proceedings. Winslow S. Pierce, attorney for defendant, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Dec. 9, 1892. John A. Shields, clerk.

273 Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Assignment of Errors.

Afterwards, to wit, on the 19th day of January, in the year of our Lord eighteen hundred and ninety-three, comes the said defendant by Winslow S. Pierce, Esq., its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. The court erred in holding that the Interstate Commerce Commission has legal capacity and faculty to sue *eo nomine* and not in the names of the members composing the commission.

Second. The court erred in denying defendant's motion to dismiss this proceeding for want of jurisdiction.

Third. The court erred in overruling defendant's plea in abatement.

Fourth. The court erred in holding that there was not a defect of parties in this proceeding, in that the Southern Pacific Company was not made a party thereto.

274 Fifth. The court erred in holding that the petition alleged facts constituting a violation by this defendant of the order of the Interstate Commerce Commission sought to be enforced in this proceeding.

Sixth. The court erred in holding that the order of the Interstate Commerce Commission sought to be enforced in this proceeding was a lawful order of said commission and that said commission had power to make said order.

Seventh. The court erred in considering as an element in the decision of this case, assumed rates from New York, Chicago and other points in the United States, via New Orleans to San Francisco, in respect to which rates there was no allegation, proof or finding in the record.

Eighth. The court erred in fixing the inland rate as an invariable proportion of the through import rate and holding that the inland tariff, or any proportion of the inland tariff affords a standard for the measurement of the through import rate.

Ninth. The court erred in holding that defendant had violated any provisions of the act to regulate commerce, and, particularly

the provisions of said act relating to unjust discrimination and undue preference.

Tenth. The court erred in not dismissing the petition in this proceeding as prayed for in defendant's answer.

Wherefore, said defendant prays that the said final order and decree of the said circuit court of the United States for the southern district of New York be reversed, and that said circuit court
275 be ordered to enter an order dismissing the petition of plaintiff in this proceeding.

WINSLOW S. PIERCE,
Attorney for Defendant, The Texas and Pacific Railway Company.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The Interstate Commerce Commission, plaintiff, against The Texas & Pacific R'y Co., defendant. Assignment of errors. Winslow S. Pierce, attorney for defendant, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Jan. 31, 1893. John A. Shields, clerk.

The United States Circuit Court of Appeals for the Second Circuit.

THE INTERSTATE COMMERCE COMMISSION, Plaintiff, Respondent,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant, Appellant.

And afterwards, to wit, on the 2d day of March, 1893, the said plaintiff, respondent, by Edward Mitchell, its attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the granting of the order or in the rendering of the decree aforesaid.

And he prays that the said circuit court of appeals before
276 the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the order and decree aforesaid in form aforesaid given, may be in all things affirmed, &c.

EDW. MITCHELL,
Attorney for Plaintiff, Respondent.

(Endorsed:) U. S. circuit court of appeals for the second circuit. The Interstate Commerce Commission, plaintiff, respondent, *versus* The Texas and Pacific Railway Company, defendant, appellant. Joinder in error. Edward Mitchell, United States attorney, attorney for plaintiff, respondent. Due service of a copy of the within is hereby admitted. New York, 3d February, 1893. Winslow S. Pierce, by Duncan, attorney for def't, appellant. U. S. circuit court. Filed Feb. 3, 1893. John A. Shields, clerk.

Know all men by these presents, that we, The Texas and Pacific Railway Company, a corporation, as principal, and George J. Gould,

of the city of New York, State of New York, as surety, are held and firmly bound unto the Interstate Commerce Commission in the just and full sum of five hundred dollars to be paid to the said The Interstate Commerce Commission, its successors or assigns, to which payment, well and truly to be made, the said principal and its successors and I, the said surety and my heirs, executors and administrators, bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 20th day of January in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately, at the October term, A. D. 1892, of the circuit court of the United States for the southern district of New York, in a proceeding pending in said court between The Interstate
277 Commerce Commission, plaintiff, and The Texas and Pacific Railway Company, defendant, an order and decree was rendered and entered against the said defendant, and the said defendant having obtained an appeal of the said court to reverse the said order and decree in said proceeding and a citation directed to the said plaintiff, citing and admonishing it to be and appear at a United States circuit court of appeals for the second circuit to be holden at the city of New York within thirty days after the date of said citation:

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY COMPANY,
[SEAL.] By GEO. J. GOULD, *President.*
GEO. J. GOULD. [SEAL.]

Attest: C. E. SATTERLEE, *Secretary.*

Sealed and delivered in presence of—
D. D. DUNCAN.

The foregoing bond is approved.

E. H. LACOMBE,
Circuit Juage.

January 31, 1893.

(Endorsed:) U. S. circuit court, so. dist. N. Y. The Interstate Commerce Commission *vs.* The Texas & Pacific Railway Co. Bond on appeal. U. S. circuit court. Filed Jan. 31, 1893. John A. Shields, clerk.

278 Circuit Court of the United States for the Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION, Plaintiff, Respondent,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant, Appellant.

The above-named defendant, The Texas and Pacific Railway Company, conceiving itself aggrieved by the order entered on November 26, 1892, in the above-entitled proceeding, doth hereby appeal from said order to the United States circuit court of appeals for the second circuit, and prays that this, its appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said United States circuit court of appeals for the second circuit, within thirty days from the date of the citation.

Dated New York, January 20, 1893.

WINSLOW S. PIERCE,
Attorney for Defendant and Appellant,
The Texas and Pacific Railway Company,
195 *Broadway, New York City.*

279 And now, to wit, on January 31, 1893, it is ordered that the appeal be allowed as prayed for.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. The Interstate Commerce Commission, plaintiff, respondent, against The Texas & Pacific R'y Co., defendant & appellant. Allowance of appeal. Winslow S. Pierce, attorney for defendant & appellant, 195 Broadway, New York. John F. Dillon, counsel. Service of a copy of the within is hereby admitted this 31st day of January, 1893. Edward Mitchell, attorney for petitioner. U. S. circuit court. Filed Jan. 31, 1893. John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

It is hereby consented and agreed, that the several consents by Dillon & Swayne, as attorneys for the defendant in the above-entitled cause, to extensions of time for defendant to answer to the plaintiff's petition herein; and to the adjournment of the hearing of this cause to such day after March 8, 1892, as
280 might be designated by the court, shall not be considered or construed to be a general appearance of defendant in this proceeding, and that defendant shall not be thereby precluded from objecting by answer, plea, or otherwise to the jurisdiction of this

court, such answer, plea or other papers to test the jurisdiction and supported by affidavit as to the facts in regard thereto, to be filed on or before March 8, 1892.

New York, February 27, 1892.

EDW'D MITCHELL,
U. S. Attorney, Attorney for Complainant.
WINSLOW S. PIERCE,
Specially Appearing as Attorney for Defendant.

I consent to the foregoing stipulation.
(Signed) JOHN D. KERNAN, *Of Counsel.*

(Endorsed:) U. S. circuit court. Interstate Commerce Commission *vs.* The Texas & Pacific Railway Company. Stipulation U. S. circuit court. Filed Feb. 4, 1893. John A. Shields, clerk.

281 Circuit Court of the United States for the Southern District of New York.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

It is hereby stipulated by and between the solicitors for the respective parties in the above-entitled cause, that the record on appeal shall consist of the following papers, viz:

1. Petition and exhibits as printed.
2. Order to show cause.
3. Notice to dismiss petition and affidavit.
4. Notice to vacate service of petition.
5. Plea of defendant.
6. Opinion, Wallace, J., overruling plea.
7. Order overruling plea.
8. Bill of exceptions.
9. Amended answer.
10. Opinion of court, Wallace, J.
11. Final decree.
12. Order staying proceedings.

282 13. Assignment of errors.
14. Joinder in error.
15. Bond on appeal.
16. Petition of appeal and allowance.
17. Stipulation as to appearance.
18. Stipulation as to record on appeal.
19. Citation; and
20. Clerk's certificate.

New York, February 28, 1893.

EDW'D MITCHELL,
U. S. Attorney and Attorney for the Interstate Commerce Commission.
WINSLOW S. PIERCE,
For the Texas and Pacific Railway Company.

(Endorsed:) Circuit court of the United States for the southern district of New York. The Interstate Commerce Commission *vs.* The Texas & Pacific Railway Company. Stipulation as to record on appeal. U. S. circuit court. Filed February 28, 1893. John A. Shields, clerk.

283 UNITED STATES OF AMERICA, *ss:*

To the Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the second circuit, to be holden at the city of New York on the 2d day of March, 1893, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Texas and Pacific Railway Company is appellant, and The Interstate Commerce Commission is respondent, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 31st day of January in the year of our Lord one thousand eight hundred and ninety-three.

E. HENRY LACOMBE,
Circuit Judge.

Service of a copy of the foregoing citation is hereby admitted this 31st day of January, 1893.

EDWARD MITCHELL.
Attorney for Interstate Commission.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Interstate Commerce Commission, plaintiff, against The Texas & Pacific Railway Company, defendant. Citation. Winslow S. Pierce, attorney for defendant, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Jan. 31, 1893. John A. Shields, clerk.

284 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 288, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The Interstate Commerce Commission, complainant and appellee, against The Texas and Pacific Railway Company, defendant and appellant, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 1st day of March, in the year of our Lord one thousand eight hundred and ninety-three,

and of the Independence of the said United States, the one hundred and seventeenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

285 United States Circuit Court of Appeals for the Second Circuit.

INTERSTATE COMMERCE COMMISSION
v.
THE TEXAS & PACIFIC RAILWAY.

SHIPMAN, *C. J.:*

On March 23, 1889, the Interstate Commerce Commission made, not upon contention of parties, a general order which, among other things, provided as follows:

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in the country or in an adjacent foreign country, is required to be taken in the inland governing other freights."

This order was quite generally obeyed by those railroad companies and their connecting lines which carried imported goods westward from the northern Atlantic seaboard. At least six railroad companies ceased after said order their previous practice of discrimination in favor of imported traffic.

On June 19, 1889, the commission filed its decision in regard to export rates in the case of The New York Produce Exchange *v.* N. Y. Central & Hudson River R. R. Company and eighteen other railroad corporations (3 Interstate C. C. Rep., 137). The opinion shows that the trunk lines, so called, had "under resolutions
286 of their association made through export rates of which the inland proportion accepted by them was at the port of New York often ten cents or more per hundred pounds less on like traffic than the published tariff rates charged at the same time to the same port." It was held "that the discrepancy between the proportion of the through rate accepted and the established tariffs for seaboard consignments for the same inland carriage is not shown to have been justified by any circumstances tending to show that it was just or proper, and that it must therefore be deemed an unjust and unlawful discrimination as against the transportation terminating at that port," and that "the only practicable mode yet devised for making through export rates, as appears by past experience, is to add to the established inland rates from the interior to the seaboard the current ocean rates."

This decision was confined to export rates at the port of New York, but as thus made was of almost national importance. It is believed that the railroad companies which were parties to the litigation complied with the order of the commission.

In this state of the general railroad policy which had been established by the commission in regard to rates which discriminated either in favor of import or export traffic against inland traffic the New York Board of Trade and Transportation filed before the Interstate Commerce Commission on November 29, 1889, a complaint

against the Pennsylvania Railroad Company and its con-
287 necting western railroad companies charging in substance that these corporations were, in violation of the act to regulate commerce, guilty of unjust discrimination in that for the transportation to Chicago and other western points, which was delivered to them at New York or Philadelphia by vessels or steamship lines from foreign ports under through bills of lading, they were charging rates fifty per cent. lower than for the like and contemporaneous service rendered to property delivered at New York or Philadelphia which did not arrive from foreign ports. Subsequently The San Francisco Chamber of Commerce became a party complainant, and divers other railroad companies, among them The Texas and Pacific and The Southern Pacific Railroad Companies, were made parties defendant until twenty-eight companies were defendant. This complaint was apparently brought to compel universal obedience to the order of March, 1889. The commission dismissed the complaint as to eighteen defendants and found that its averments were true as to ten defendants, among which were The Texas and Pacific and The Southern Pacific Companies, and as to said defendants ordered, on January 29, 1891, that each of them, on and after May 5, 1891, cease from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States or any port of entry in a foreign country adjacent to the United States upon through bills of lading and destined to any place within
288 the United States upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, which order was duly served upon the Texas Pacific Railroad Company; also from New Orleans via the same route to the same destination, substantially as stated in Exhibit 36.

Its reason for a discrimination in inland rates between foreign and domestic merchandise will be stated hereafter.

The answer further said that the order affected its rates from London, Liverpool, and other foreign European points to Missouri River points, but that these rates became so low that it had cancelled its tariff and was charging on such business as it received, destined from Europe to the Missouri river, the local rates from New Orleans.

The answer further stated that the order also affected the rates of transportation on articles from Europe to towns in Texas and Colorado.

The testimony was taken before the circuit court. The case was heard upon petition and answer and an injunction was directed against the defendant in accordance with the prayer of the petition. From this decree the defendant has appealed to this court.

Exhibit 36 shows a very marked discrimination in rates
289 from New Orleans to San Francisco between those charged upon merchandise shipped by through bills of lading from Liverpool to San Francisco and those charged upon the same kind of goods delivered to the defendant at New Orleans from places in this country for transportation to San Francisco. For example, the

through rates from Liverpool to San Francisco, per hundred pounds, on books, shoes, carpets, cashmeres, cutlery, and woolen goods were $1.07, of which the railroad received for carriage from New Orleans to San Francisco eighty cents, while upon the same classes of goods received from points in this country at New Orleans the rates for carriage from New Orleans to San Francisco, per hundred pounds, were as follows: Upon books and carpets, $2.88; upon shoes, cashmeres, cutlery, and woolen goods, $3.70.

The finding of facts by the commission shows that in 1889 the importations of the Texas & Pacific railway were about five millions of pounds, of which about 2,500,000 pounds went to Missouri River points, about 2,000,000 pounds to the Pacific slope, California terminals, and Oregon points, and the remainder was distributed mostly in Colorado and Utah, while a little of it went to Texas. As the defendant is charged with a violation of the order only with respect to its rates to California terminals, it is necessary to state no other facts than those which related to that part of its business.

The through rates from Liverpool to San Francisco are
290 controlled by the competition at Liverpool and London of steamships connecting with railroads across the isthmus of Panama and, in a small degree, with respect to cheap, heavy goods of sailing vessels around Cape Horn.

The defendant carries import traffic at the reduced rate to California terminals only. To intermediate points the regular inland rates are charged. This traffic is taken at the reduced rate because unless so taken the defendant would, by reason of the competition, lose the business which it is expected will increase. The defendant places the dissimilarity of conditions between the transportation of imported and domestic goods solely upon this ocean competition. There is apparently no other reason why the inland rate should not be applied to all business, both domestic and foreign. No finding was made as to the profit upon the San Francisco business. There was a profit, when the case was heard before the commission, upon the Missouri business. It was found that the Southern Pacific proportion of the through rate would not, in the absence of competition, be a full and fair return for the transportation service rendered. It gave the road something more than the actual cost of the movement of the freight.

The commission contended that upon these facts the defendant had violated the second section of the act to regulate commerce, which prohibits unjust discrimination in the compensation charged for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances
291 and conditions; had also violated the third section, which prohibits any undue or unreasonable preference or advantage to any particular description of traffic.

The defendant insisted that the dissimilar conditions growing out of the ocean competition freed its conduct from the prohibition of the statute.

The commission in deciding the original case held that the class of dissimilar conditions was not in the contemplation of the statute

and was not to be regarded in the regulation of inland tariffs or rates. Its language was as follows:

"These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regulation procided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction. To hold otherwise would be for the commission to create exceptions to the operation of the statute not found in the statute, and no other power but Congress can create such exceptions in the exercise of legislative authority."

It further said, "Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination
covering other like kind of traffic in the elements of bulk,
292 weight, value, and of carriage, and no unjust preference must
be given to it in carriage or facilities of carriage of that freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line."

Its conclusion was that foreign and home merchandise "under the operation of the statute, when handled and transferred by interstate carriers engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, charges, and treatment for similar services rendered."

This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities

which have a foreign origin are to be excluded from consideration under the operation of the statute, is an exceedingly important one, whose ultimate decision may have a wider influence upon the interstate commerce of the country that we can foresee. This legal question was not discussed in the export-rate case, which was treated "as one of practical policy."

293 We are not disposed to pass authoritatively upon this question, except in a case which demands it and in which the effect of this construction of the statute is naturally the subject of discussion. This petition presents a question of narrow limits, which relates only to the validity of the order so far forth as it concerns the conduct of the defendant in its joint rates for transportation of imported traffic from New Orleans to San Francisco, and is whether these rates subject domestic traffic between same points to an undue disadvantage.

The same conditions exist between New Orleans and San Francisco with reference to each class of goods. There was no "difference in cost, expense, or the exceptional character of the service." The only reason which induces the defendant to take the import business is competition in Great Britain between water routes, which drives it to carry an importe-'s case of cutlery for eighty cents per hundred pounds when it requires a hundred pounds of domestic cutlery to pay $3.70 for the same carriage. Assuming that ocean competition can create a dissimilar condition, which is to be considered in determining whether discriminations against particular classes of traffic are unjust and is a fact to be taken into account in determining whether a particular traffic is subjected to an unreasonable disadvantage (Phipps *v.* London & N. W. R. Co., 1892, 2 Q. B., 229), does this condition justify the great disparity in rates in this case?

294 While it is true that under sections 2 and 4 of the statute substantially dissimilar conditions may justify dissimilarity in rates, it does not follow that any dissimilar conditions, of whatever kind it may be, justifies any discrepancy in rates.

Gross inequality shows either that the road which makes the inequality is unjust to itself in carrying goods without profit "or else the larger rate gives an unwarranted return for the services rendered" (Board of Trade of Chattanooga *v.* E. Tenn., Va. & Ga. R. R. Co., Insterstate Com., Dec. 30, 1892). In this case it may fairly be presumed that the joint rates gave each road something more than the cost of movement, leaving repairs, interest upon floating debt, and all fixed charges to be paid by the rates upon some other traffic. The rates were not entirely unremunerative, and if so, the much larger rates placed upon domestic traffic not only compelled it to bear an undue burden, but gave the company an unwarranted return.

Exhibit 36 cannot be examined in the light of the admitted facts of equality of conditions from the port of New Orleans without the conviction that unless the defendant is injuring itself by its rates upon imported goods it is imposing an exceedingly high rate upon domestic goods. It is true that a person who pays only a fair price

for a service cannot justly complain merely because another pays too little for the same service (Gaston *v.* Bristol & E. R. Co., 1 Best & S., 112); but this general truth does not meet the conditi-
295 tions of this case, which are of such inequality that the larger rates must be found to be excessive. It has been justly said by the commission that rates should not only be reasonable but be relatively reasonable, and thus not become unjust in their results (Board of Trade Union *v.* Chic., Mil., &c., *F.* R. Co., 1 I. C. Rep., 215). It follows that the conduct of the defendant was in violation of section- two and three of the statute in question, and was properly attempted to be corrected by the order which was disobeyed.

But it will be urged that if it is assumed that ocean competition can create a dissimilar condition, it follows that it is a condition which may rightfully be regarded in establishing rates for import and domestic traffic, and that the order of the commission which directed equality should not be enforced because some inequality should not be enforced *because some inequality* might be justifiable.

The accusation against the railroad companies in the original complaint before the commission was not that they were charging too low rates upon import traffic, but that by their relatively excessive rates upon domestic traffic they were unjustly discriminating against the latter. The underlying question which arises from the petition to the circuit court is the same. The defendants before the commission averred that its "domestic rates are fair and reasonable in themselves." In its answer to the petition it omits
296 this averment, does not justify its rates upon domestic traffic, and does not state, if a reduction should be made, what excess of rates could properly be placed upon that kind of traffic, but defends the existing difference in rates solely upon the ground that if it charged higher rates upon the import traffic it would lose that class of business.

The final question before the circuit court was: "Is the order of the commission a proper one, and should obedience to it be insisted upon"? In order to decide that question the answer presented two questions upon the subject of rates: 1st. Can ocean competition be regarded in any event as creating a dissimilar condition? 2d. If it can, is the difference in the existing rates justified by that condition? A third question might have been, but was not presented, viz: In the event that the first question is answered in the affirmative and the second is answered in the negative, does the dissimilar condition justify any, and, if so, what, dissimilarity in rates? To answer this question the court should have been informed in regard to the reasonableness of existing rates upon domestic traffic.

This court is of opinion that, assuming that the first question can be answered in the affirmative, the second must be answered in the negative, and that an unfair inequality of rates is plainly manifest.

There is nothing in the record which enables the court to determine that the assumed dissimilar condition justified any sub-
297 stantial dissimilarity in rates, and it ought not to permit

disobedience to an order until it can suggest a better one as a substitute.

The defendant's apparent position, that inasmuch as substantially dissimilar conditions create dissimilarity in rates is not important, cannot be sustained. That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make is not true. To set aside the order of the commission and permit the present excessive inequality of rates, in the absence of any attempt to show the reasonableness of the inequality, would not accord with justice.

Two objections which have been taken by the defendant to the jurisdiction of the court remain to be considered.

Section 16 provides that in case of the disobedience of a common carrier which is subject to the provisions of the act to a lawful order of the commission the latter can apply for an injunction by petition to the circuit court, sitting in equity, in the judicial district in which the carrier has its principal office or in which the disobedience of such order has taken place.

That petition was brought in the southern district of New York upon the ground that the principal office of the defendant was in the city of New York, whereas it is said to be in Texas.

298 The charter does not declare where the principal office of the company shall be. In fact, the stockholders' meetings and directors' meetings are held in New York, where also is the office of the president, first vice-president, secretary, and treasurer of the company, and where the stock-certificate books and records of the stockholders' and directors' meetings are kept. The New York office is thus the domicile of the corporation and the principal office, while the general or administrative offices of the heads of departments are in Texas.

It is also contended that inasmuch as the rates upon import traffic were joint rates with the Southern Pacific Railroad Company and as any order of the circuit court requiring the defendant to desist from carrying business upon such joint rates would abrogate contracts and agreements to which said company is a party, it is a necessary party to the petition.

It is true that in proceedings before the commission to test the legality of through rates the commission, which has the power to make other common carriers parties, irrespective of their places of residence, has insisted upon the necessity of bringing in all the corporations which make the rates and has said, "They must be brought in, first, because they have a right to be heard, and, second, because an order made and purporting to control their action when they were not parties would be improper on its face and in

299 a legal sense ineffectual (Allen *vs.* Louisville, &c., Railroad Company, 1 I. C. C. Rep., 199). In the proceeding before the commission the Southern Pacific Company was a party.

The present proceeding is a petition to compel obedience to an order made upon hearing, and presumably correctly made, which

is brought before a circuit court whose jurisdiction over parties is limited and controlled by statute.

The circuit court for the southern district of New York has no jurisdiction over the Southern Pacific Railway Company, whose principal office is not in that district; neither would a circuit court in any one district in which the violation was committed—in Texas or Louisiana or California—probably be able to obtain jurisdiction over both the railroad companies which made the rates. The proceeding before the circuit court should not be rendered impossible in the event of its inability to obtain jurisdiction over all the disobeying companies which have united in making through rates, and inasmuch as the proceeding is to enforce an order already made, after hearing all the parties in interest, the presence of all the parties who have jointly disobeyed is not necessary or indispensable.

The decree of the circuit court is affirmed with costs.

John D. Kernan and Edward Mitchell, U. S. district att'y, for the complainant; Winslow S. Pierce and David D. Duncan, for the defendant.

300 [Endorsed:] U. S. cir. c't of appeals. "Import rate case." Opinion.

301 Copy.

At a stated term of the United States circuit court of appeals held in the post-office building, in the city of New York, on the 11th day of December, 1893.

Present: Hon. Nathaniel Shipman, Hon. E. Henry Lacombe, judges.

THE INTERSTATE COMMERCE COMMISSION, Petitioner and Appellee,
against
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant and Appellant.

This case having come on to be heard on appeal from the decree made herein by the circuit court of the United States for the southern district of New York on the 3rd day of June, 1893, and due deliberation having been had, now, on motion of Edward Mitchell, Esq., attorney for the petitioner—

It is ordered that the said decree be, and the same hereby is, affirmed, with costs of this court to be taxed, and that a mandate issue to the circuit court of the United States for the southern district of New York to proceed in accordance with the opinion of this court.

And said appellant, The Texas & Pacific Railway Company, having in open court given notice of an intention to appeal to the Supreme Court of the United States, it is, on motion of counsel for said railway company, further—

302 Ordered that the issuance of the mandate herein be stayed for fifty days; and, further, that in case said defendant shall

take and perfect an appeal to the Supreme Court within said fifty days the issuance of said mandate be further stayed during the pendency and until the decision of said appeal, but that if said appeal be not taken and perfected within said fifty days said stay be vacated, and said mandate shall thereupon issue; and it is further—

Ordered that all proceedings under the final order and decree herein be stayed, and that no injunction be issued thereunder until said mandate shall be issued as hereinabove provided.

E. H. L.
N. S.

303 [Endorsed:] U. S. circuit court of appeals for 2nd circuit. Interstate Commerce Commission *vs.* Texas & Pacific R'y Co. Copy. Order for mandate, &c. Rec'd Dec. 14, 1893.

304 United States Circuit Court of Appeals for the Second Circuit.

THE INTERSTATE COMMERCE COMMISSION, Plaintiff, Respondent,
against
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant, Appellant.

Assignment of Errors.

Afterwards, to wit, on the 26th day of December, 1893, comes the said defendant, appellant, by Winslow S. Pierce, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. The circuit court of the United States for the southern district of New York erred in holding that the Interstate Commerce Commission has legal capacity and faculty to sue *eo nomine* and not in the names of the members composing the commission.

Second. The said circuit court erred in denying defendant's motion to dismiss this proceeding for want of jurisdiction.

Third. The said circuit court erred in overruling defendant's plea in abatement.

Fourth. The said circuit court erred in holding that there was not a defect of parties in this proceeding in that the Southern Pacific Company was not made a party thereto.

305 Fifth. The said circuit court erred in holding that the petition alleged facts constituting a violation by this defendant of the order of the Interstate Commerce Commission sought to be enforced in the proceeding.

Sixth. The said circuit court erred in holding that the order of the Interstate Commerce Commission sought to be enforced in this proceeding was a lawful order of said commission, and that said commission had power to make said order.

Seventh. The said circuit court erred in considering as an element in the decision of this case assumed rates from New York, Chicago, and other points in the United States via New Orleans to

San Francisco, in respect to which rates there was no allegation, proof, or finding in the record.

Eighth. The said circuit court erred in fixing the inland rate as an invariable proportion of the through import rate and holding that the inland tariff or any proportion of the inland tariff affords a standard for the measurement of the through import rate.

Ninth. The said circuit court erred in holding that defendant had violated any provisions of the act to regulate commerce, and particularly the provisions of said act relating to unjust discrimination and undue preference.

Tenth. The said circuit court erred in not dismissing the petition in this proceeding as prayed for in defendant's answer.

Eleventh. The United States circuit court of appeals erred in adopting and committing the several errors of the court be-
306 low, as hereinbefore assigned and above set forth.

Twelfth. The said circuit court of appeals erred in holding that the degree of disparity between inland and import rates, shown by the record, was a proper subject for consideration in determining the issues herein; and, while assuming that ocean competition may create a dissimilarity of conditions, that the degree of such disparity of inland and import rates justified an affirmance of the order or decree of the court below.

Thirteenth. The said circuit court of appeals erred in affirming the order or decree of the court below.

Wherefore said defendant, appellant, prays that the said final order and decree of the said United States circuit court of appeals for the second circuit be reversed and that said court be ordered to enter an order dismissing the petition of plaintiff herein.

WINSLOW S. PIERCE,
Attorney for Defendant, Appellant,
The Texas & Pacific Railway Company.

Endorsed as follows: "United States circuit court of appeals for the second circuit. The Interstate Commerce Commission, plaintiff, respondent, against The Texas & Pacific Railway Company, defendant, appellant. Assignment of errors. Winslow S. Pierce, attorney for def't, app'l't, 195 Broadway, New York. John F. Dillon, counsel. Service of a copy of the within is hereby admitted this 28th day of December, 1893. Edw'd Mitchell, U. S. att'y and attorney for the appellee."

307 United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Appellant,
against
THE INTERSTATE COMMERCE COMMISSION, Appellee.

The above-named appellant, The Texas and Pacific Railway Company, conceiving itself aggrieved by the order entered on December 11th, 1893, affirming the final order and decree rendered by the circuit court of the United States for the southern district of

New York, entered November 26, 1893, in the above-entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States, and prays that this its appeal be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said Supreme Court of the United States within thirty days from the date of the citation.

Dated New York, December 26, 1893.

WINSLOW S. PIERCE,
Solicitor for the Appellant,
The Texas & Pacific Railway Company.

Appeal allowed as prayed this 28th day of December, 1893.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Endorsed as follows: "United States circuit court of appeals for the second circuit. The Texas & Pacific Railway Company, appellant, against The Interstate Commerce Commission, appellee. Allowance of appeal. Winslow S. Pierce, attorney for appellant, 195 Broadway, New York. John F. Dillon, counsel. Service of a copy of the within is hereby admitted this 28 day of December, 1893. Edw'd Mitchell, U. S. attorney & attorney for the appellee."

308 Know all men by these presents that we, The Texas and Pacific Railway Company, as principal, and George J. Gould, of the city and State of New York, as surety, are held and firmly bound unto the Interstate Commerce Commission in the full and just sum of five hundred dollars, to be paid to the said The Interstate Commerce Commission, certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a regular term of the United States circuit court of appeals for the second circuit, in a suit depending in said court between The Texas and Pacific Railway Company, appellant, and The Interstate Commerce Commission, appellee, a decree was rendered against the said The Texas and Pacific Railway Company, and the said The Texas and Pacific Railway Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decreé in the aforesaid suit, and a citation directed to the said The Interstate Commerce Commission citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific Railway Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

[Seal T. & P. R'y Co.]

THE TEXAS AND PACIFIC RAILWAY CO.,
By GEO. J. GOULD, *President.*
GEO. J. GOULD. [SEAL.]

Attest: C. E. SATTERLEE, *Sec'y.*

Sealed and delivered in presence of—
D. D. DUNCAN.

Approved by—
E. HENRY LACOMBE,
U. S. Circuit Judge.

309 [Endorsed:] U. S. circuit court of appeals, 2nd circuit. The Texas and Pacific Railway Company, appellant, *vs.* The Interstate Commerce Commission, appellee. Bond. Winslow S. Pierce, sol'r for appellant, 195 Broadway, N. Y. city.

310 UNITED STATES OF AMERICA, *ss:*

To the Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein — and you are appellee, to show cause, if any there be, why the order & decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, judge of the United States circuit court of appeals for the second circuit, this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

E. HENRY LACOMBE,
U. S. Circuit Judge.

311 [Endorsed:] U. S. circuit court of appeals, 2nd circuit. The Texas and Pacific Railway Company, appellant, *vs.* The Interstate Commerce Commission, appellee. Citation. Winslow S. Pierce, sol'r for appellant, 195 Broadway, N. Y. city. Service of a copy of the within is hereby admitted this 28th day of December, 1893. Edward Mitchell, U. S. att'y & att'y for appellee.

312 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to 311, inclusive, contain a true and com-

plete transcript of the record and proceedings had in said court in the case of The Interstate Commerce Commission, complainant and appellee, against The Texas and Pacific Railway Company, defendant and appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of January, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and eighteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 15,494. U. S. circuit court of appeals, second circuit. Term No., 631. The Texas & Pacific Railway Company, appellant, *vs.* The Interstate Commerce Commission. Filed January 29, 1894.

Office Supreme Court U. S.
FILED.
DEC 3 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 631.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

against

THE INTERSTATE COMMERCE COMMISSION.

IMPORT RATE CASE.

Argument for the Railway Company.

JOHN F. DILLON,
WINSLOW S. PIERCE,
For the Railway Company.

C. G. Burgoyne, cor. Walker and Centre Streets, N. Y.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant, AGAINST THE INTERSTATE COMMERCE COMMISSION.	No. 631.

ARGUMENT FOR THE RAILWAY COMPANY.

Statement.

On the 23d day of March, 1889, the Interstate Commerce Commission, *sua sponte*, made a general order providing, among other things, that:

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

I. C. C. Rep., 656, 659 (Rec., p. 105).

On the 29th day of November, 1889, the New York Board of Trade and Transportation, presented, before the Interstate Commerce Commission, a petition mak-

ing the Pennsylvania Railroad Co. and other railroad companies defendants, and charging the defendants with violation of the Interstate Commerce Act, in that

"they have been and are in the habit of charging their regular tariff rates upon property when delivered to them at New York and Philadelphia for transportation to Chicago and other Western points, while charging other persons rates much lower, and even as low as 50 per cent. thereof, for a like and contemporaneous service, under substantially similar circumstances and conditions, when the property was or is delivered to them at New York and Philadelphia by vessels and steamship lines under through bills of lading from foreign ports and foreign interior points, issued under common agreement between the defendants and such vessels and steamship lines and foreign railroads for continuous carriage at joint rates from the point or port of shipment to said Chicago and other Western points. The defendant's share of such through rate for the inland transportation has been and is, as aforesaid, lower than its regular tariff rates (being in some cases as low as 50 per cent. thereof), and therein in such instance constitutes an unjust discrimination under the act aforesaid" (Rec., pp. 11–14).

Subsequently, upon representation to the Commission that other railroad companies were engaged in business of like character, and that a like disparity existed between their inland rates and the inland proportion of import rates, the Commission, by several orders, directed that such other railroad companies should be made parties defendants, and the issues were broadened—*not by amended petition or additional allegations, but by the scope given to the matter through the inquiry of the Commission*—so that the import rates through other seaboard points, such as New Orleans, were ultimately involved and affected by the final order of the Commission (Rec., pp. 42, 43). Among the railroad companies thus made parties was the Texas

and Pacific Railway Company, and it was required to answer the petition. This answer is found at page 61 of the Record—Exhibit 33 attached to petition.

Upon hearing, the Commission reported that violations of the Act to Regulate Commerce had been committed in the respects complained of; holding that while the Act specifically provides for the regulation of transportation of foreign merchandise when brought from a foreign port of shipment to a port of entry of the United States, and transported from such port of entry to a place within the United States upon a through bill of lading, or when transported from a foreign port to a port of entry of a foreign country adjacent to the United States, and transported from such port of entry to a place of destination within the United States upon a through bill of lading, the regulation thus provided is such as regulates the rates, charges, facilities afforded and treatment of the foreign merchandise from the port of entry in either instance, as the case may be, to the place of destination of the merchandise within the United States, and is not a regulation that extends to the control of rates made upon such foreign merchandise in the foreign port or shipment for its carriage to the port of entry of the United States or to the port of entry in a foreign country adjacent to the United States (Syllabus to Commismission's Findings and Conclusions. Rec., pp. 64, 65).

Upon these conclusions the Commission made an order requiring a number of companies, including the Texas and Pacific Railway Company,

"to wholly cease and desist from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States

or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, or at any other, than the same rates established in said published inland tariff for the carriage of other like kind of traffic in the elements of bulk, weight, value and expense of carriage " (Rec., pp. 130, 131).

THE COMMISSION FOUND, among other things : That " the proportion the Texas and Pacific received of the through rate is remunerative " (Rec., p. 81). That " the tariff of the Texas and Pacific Railway to California and the Pacific coast terminals is published, and has been at that figure for a long time " (Rec., p. 81). That " there is a sugar refining business and some cotton mills at New Orleans, but there cannot be said to be any manufactories there to any considerable extent " (Rec., p. 81).

The report of the Commission also shows (Rec., p. 80) that

" In 1889 the importations of the Texas and Pacific Ry. Co. were about 5,000,000 of pounds of import business, of which about 2,500,000 pounds went to Missouri River points, about 2,000,000 to the Pacific slope, California terminals and Oregon points, and the remainder was distributed in Colorado, Utah, and a little of it in Texas " (Rec., pp. 80, 81).

THE PRESENT PROCEEDING is instituted in the name of the Interstate Commerce Commission to compel compliance on the part of the defendant Railway Company with the above-recited order of the Commission (Rec., p. 1).

THE PETITION alleges that the Railway Company has violated the order of the Commission in that it has not ceased and desisted from carrying certain articles of import traffic upon any other than its published inland tariff, and in specification of this violation alleges that the Railway Company has carried and carries certain traffic described in a table attached to the petition as Exhibit 36 (Rec., pp. 132–134), shipped from Liverpool, England, through the Port of New Orleans to San Francisco, California, upon joint rates specified in the table, and not upon the inland joint tariff of defendant and the Southern Pacific Railway Company, covering traffic originating at the Port of New Orleans and carried to San Francisco; the latter rates being also set forth in the table, "Exhibit 36" (Rec., pp. 155, 162).

The defendant Railway Company objected to the jurisdiction of the Court by a motion to dismiss (Rec., p. 135), by a motion to vacate and set aside service, and to dismiss for want of jurisdiction of subject matter, and by verified plea to the jurisdiction (Rec., p. 140), the motions being supported by affidavits showing, and the plea alleging, that the Texas and Pacific Railway Company did not have or maintain its principal office in the Southern District of New York. Under stipulation between the parties (Rec., p. 143), the questions of jurisdiction thus raised were submitted upon the affidavits interposed on behalf of the parties respectively, and upon the papers and pleadings. The motion to dismiss was denied and the plea in abatement to the jurisdiction overruled, to all of which the defendant company excepted (Rec., p. 142).

The Railway Company thereupon filed its answer to the petition of the Interstate Commerce Commission.

THE ANSWER of the defendant company in the present proceeding is substantially this:

1. The legal capacity or faculty of "The Interstate Commerce Commission" to sue, *eo nomine*, and not in the names of the members composing the Commission, is denied (Par. 1, p. 155).

2. The general objection of INSUFFICIENCY is made to the petition (Par. 2, pp. 155, 156.)

It is also objected:

(*a*) That no facts are alleged constituting any violation by this defendant of the order of the Interstate Commerce Commission and the petition does not show or allege any specific act or acts of the defendant in violation or disobedience of the Act to Regulate Commerce or of the amendments thereto (Par. 2, p. 156).

(*b*) That the petition does not allege or show any violation or disobedience by the defendant of any lawful order of the Commission (Par. 2, p. 156).

3. It is objected that there is a DEFECT OF PARTIES in that the Southern Pacific Company is not made a party (Par. 3, pp. 156, 157).

THE FACTS alleged in the answer are:

1. That *import* and *inland* traffic have been carried over the Texas and Pacific Railway and the Southern Pacific Railway, from New Orleans to San Francisco, substantially as stated in Exhibit 36 to the petition (Par. 6, p. 158).

2. That the *rates* named in said Exhibit 36 from London and Liverpool to San Francisco are *fixed and controlled by the competition (a)* of sailing vessels for the entire distance; *(b)* of steamship and sailing ves-

sels in connection with railroads across the Isthmus of Panama; *(c)* by steamship and sailing vessels from Europe to New Orleans, connecting there under through arrangements with the Southern Pacific Company to San Francisco. That none of those lines (except the Southern Pacific) are subject to the Act to Regulate Commerce or to the jurisdiction and control of the Commission (Par. 6, p. 158).

3. That, *unless defendant charges substantially the rates* specified in Exhibit 36, *it will lose this import business and the revenues* derived therefrom, which are considerable, important and valuable to it, this traffic during the year 1891 reaching 8,165,000 pounds (Par. 6, p. 158).

4. That the rates named in said Exhibit 36 *work no prejudice or disadvantage to New Orleans;* that if the defendant be denied the right to participate in such traffic it *would move via the routes and lines above mentioned* without benefit to New Orleans, but on the contrary to its disadvantage to the extent that it could be carried by other routes instead of through that port (Par. 6, p. 158).

5. That the *import traffic is upon orders by persons, firms and corporations in San Francisco* and vicinity, buying direct of first hands in London, Liverpool and other European markets, and if the order of the Commission were carried into effect it would not result in discontinuance of that practice or in inducing like purchases in New Orleans in any event (Par. 6, 159).

The answer also shows that defendant's import business, destined for San Francisco alone, amounted, dur-

ing the year 1891, to 8,165,000 (an increase of over 3,000,000 pounds above the year of 1889, and more than three times as much as was carried during the latter year to the Pacific Coast, California terminals, Oregon points, &c., as shown by the Commission's Findings, Rec., pp. 80, 81). The answer proceeds to show that, while the allegations of the Petition relate only to joint import rates from London and Liverpool to San Francisco, and joint inland rates from New Orleans to San Francisco, the order of the Commission, if enforced in the broad terms in which it was announced, would cover and affect important import traffic of the defendant to interior points in the United States (Par. 7, p. 159).

(a) That in the year 1891 the defendant transported import traffic destined to Missouri River points to the amount of 17,242,632 pounds ; that this traffic was carried by it with substantial profit at a proportion of the through rate not in all cases corresponding to the inland rate from New Orleans to the points of destination (Par. 7, p. 159).

(b) That there are large shipments of cement from European points to Texas points, and especially to Dallas, Fort Worth, Sherman and other Northern Texas cities. That the ocean rates on cement from European points to the Port of Galveston are substantially the same as the rates to the Port of New Orleans, and that the local rates from Galveston to Texas points, in accordance with long-established differentials, are less than from the Port of New Orleans—in the case of cement the differential reaching 11 cents and increasing as the points of destination are nearer to Galveston. That under the order of the Commission the defendant will be deprived of participation

in this traffic, and that the same would be re-shipped at Galveston to interior Texas points over lines of railway not subject to the control of the Act to Regulate Commerce or the jurisdiction of the Commission; that this situation in respect to differentials affects the carriage of large amounts of cement destined to Colorado points, the local rates from Galveston being five cents less than from New Orleans (Par. 7, p. 160).

(c) The same conditions affect imports of large quantities of foreign tin plate and earthenware, as well as many other articles of import traffic, at markets in the interior of Texas and at Colorado points (Par. 7, p. 161).

As to all of the classes of import traffic above referred to, the answer shows that the defendant engages in this transportation without detriment to New Orleans or its merchants, and that the effect of the Commission's order would be to compel it to retire from this import business to its own great loss and injury, and without advantage to New Orleans, or to its merchants, or to any other interest than that of foreign carriers who, unembarrassed by the control or regulation of the Commission, compete with it for this traffic.

Assignment of Errors.

We make the following assignments of error:

I.

The Circuit Court of the United States for the Southern District of New York erred in holding that the Interstate Commerce Commission has legal capacity to sue *eo nomine* and not in the names of the members composing the Commission.

II.

The said Circuit Court erred in denying defendant's motion to dismiss this proceeding for want of jurisdiction.

III.

The said Circuit Court erred in overruling the defendant's plea in abatement.

IV.

The said Circuit Court erred in holding that there was not a defect of parties in this proceeding in that the Southern Pacific Company was not made a party thereto.

V.

The said Circuit Court erred in holding that the petition alleged facts constituting a violation by this defendant of the order of the Interstate Commerce Commission sought to be enforced in the proceeding.

VI.

The said Circuit Court erred in holding that the order of the Interstate Commerce Commission sought to be enforced in this proceeding was a lawful order of said Commission, and that said Commission had power to make said order.

VII.

The said Circuit Court erred in considering as an element in the decision of this case assumed rates from New York, Chicago and other points in the United States, via New Orleans to San Francisco, in respect to which rates there was no allegation, proof or finding in the record.

VIII.

The said Circuit Court erred in fixing the inland rate as an invariable proportion of the through import rate and holding that the inland tariff or any proportion of the inland tariff affords a standard for the measurement of the through import rate.

IX.

The said Circuit Court erred in holding that defendant had violated any provisions of the act to regulate commerce, and particularly the provisions of said act relating to unjust discrimination and undue preference.

X.

The said Circuit Court erred in not dismissing the petition in this proceeding as prayed for in defendant's answer.

XI.

The United States Circuit Court of Appeals erred in adopting and committing the several errors of the Court below, as hereinbefore assigned and above set forth.

XII.

The said Circuit Court of Appeals erred in holding that the degree of disparity between inland and import rates, shown by the record, was a proper subject for consideration in determining the issues herein; and, while assuming that ocean competition may create a dissimilarity of conditions, that the degree of such disparity of inland and import rates justified an affirmance of the order or decree of the Court below.

XIII.

The said Circuit Court of Appeals erred in affirming the order or decree of the Court below.

ARGUMENT.

I.

The Commission had no power to make the order in question. It is not a "lawful order."

The Commission was absolutely without power or jurisdiction to make the order of March 23, 1889 *(ante.*, p. 1*)* sought to be specifically applied to the Texas and Pacific Railway Company by the proceeding in this case.

That order was not a "*lawful order.*"

By the Act to regulate commerce Congress did not delegate any general legislative powers to the Commission. That body was created as an instrumentality through which the provisions of the Act should be enforced.

It was given no power to add to the law. Its function is to INQUIRE *into specific cases of violation.* It has no power to ENACT GENERAL REQUIREMENTS.

It may make no general orders except in respect to those few matters—such as requiring the carriers subject to the law to make reports, to file and publish tariffs, &c.—over which the Act specifically gives it this right.

It is incumbent on any person or body claiming to derive, from statutory enactment, power or authority to do any act, to definitely point out the provisions of the Statute in which the power is conferred. The Commission has not done that in this case. It cannot do it. The Act to Regulate Commerce contains no provision authorizing the Commission to make such an order.

It is extremely doubtful whether the Commission is justified, by any grant of power contained in the act, in declaring what are reasonable rates for specific services in the particular cases which are presented to it. It has claimed and exercised this power. But it is certain that it has derived from the act no power whatever to enact and promulgate a broad legislative requirement such as that involved in the present case. No doubt principles may be deduced from its decisions in particular cases; but the act will be searched in vain for its authority to announce its general conclusions as law, to formulate additions to or qualifications of the Act by general orders of far-reaching consequences, or to do more than entertain complaints of specific violations of the law as found in the Act, and in that alone. In the present case the Commission has undertaken to enact that all import business of railroad companies shall be taken upon their inland tariffs. The law does not make this requirement. Even should it be admitted that the order is a proper construction of the law, the Commission was without power to make it. A *lawful order* is one made in pursuance of law and having the force of law. The act confers upon the Commission no power to announce its construction of the law by general order of binding force, made *sua sponte*, and extending beyond the specific issues of any pending proceeding.

It is a fundamental doctrine of judicial administration that general rules of conduct are not prescribed by the Courts. The Courts decide particular cases. So with the *quasi* judicial functions of the Commission. It investigates cases of alleged violation of the rules of conduct prescribed by the statute. It was given no

power to inquire into or to correct the violation of any rules of conduct of its own creation.

The Commission has lately reached the conclusion, and has held that it is not a *Court*.

"The Commission is not a court. It is a special tribunal, whose duties, though largely administrative, are sometimes semi or quasi judicial. It is required to *investigate and report*. The law creating the Commission does not mention its final act as a judgment. It renders no judgment, enters no decree. * * * The whole scope and spirit of the Act to Regulate Commerce seem to stamp the report and order of the Commission as in no sense final in the sense that the judgment of a court is final, except where the parties impressed by the wisdom and justice of the order acquiesce therein, in cases like those here under consideration."

Toledo Produce Exchange vs. Lake Shore & M. S. R. R. Co., III., I. C. C. R., p. 835.

The Commission is invested with the power to make orders in cases where specific violations of the act are complained of. These orders have not the force of judgments or decrees, but are enforceable only in the Federal Court, and the faculty to sue for the enforcement of these orders is conferred upon the Commission.

There is still less question as to *legislative powers*. The Commission has none. It must enforce the Act as it finds it. It may not amplify, restrict or qualify any of the provisions of the Act. It may not impose upon the carriers any rule or order for which the strict letter of the Act gives no sanction. It is not an agency to regulate; but to apply the regulation provided in the statute—none other.

We confidently submit that the general order of March 23d, 1889, as originally made, or as repeated by the Commission in the present case, was not a lawful order.

II.

The petition is insufficient; it states no case against the defendant company.

The petition charges the defendant Railway Company with violation of the order of the Commission in that it charges the joint rates for inland and import traffic respectively, which are set forth in Exhibit 36 to the petition (Rec., p. 10). Exhibit 36 (pp. 132–134) purports to be a "statement showing rates in cents per 100 pounds charged for the transportation of commodities named from Liverpool and London, England, via New Orleans, *The Texas and Pacific Railway Company and the Southern Pacific Company system*, to San Francisco, and also from New Orleans *via same route* to same destination."

This statement is made by the Auditor of the Interstate Commerce Commission from tariffs on file among the records of the Commission (pp. 133–134).

The JOINT IMPORT RATE and the JOINT INLAND RATE constitute the adjustment complained of as unlawful. The Texas and Pacific Company, one of the two companies subject to the jurisdiction of the Commission, who are parties to these joint rates, is the only defendant. *It is not shown what proportion of either joint rate is received by the defendant company*—the only charge is that it participates in these joint rates. **The petition wholly fails to charge or show that the proportion of the through import rate received by defendant is not equal to its proportion of the joint inland rate, and hence fails to show that the defendant has violated the order of the Commission.** For

aught that appears in the petition the defendant charges the same sum as its proportion of both rates.

It is not worth while to amplfy this. It is obvious that the defendant is not charged with any independent violation of the order of the Commission ; that the petition does not show its proportions of through rates and its local tariffs, and alleges no instance in which it carries import business upon any other than its own local or inland tariffs.

In short, and to illustrate, there is absoluteiy nothing in the petition inconsistent with the idea that the defendant company receives fifty cents as its division or proportion of each rate, and hence charges its own inland or local rate for its own service in the carriage of import traffic.

The petition is therefore clearly insufficient.

If, however, it is the purpose and legal effect of the allegations of the petition to charge that the joint rates of the Texas and Pacific and the Southern Pacific Companies, considered in their aggregate aspect, present a case of violation of the Commission's order, then, as we submit, it is obvious that this Court can make no judgment or decree without the presence of the Southern Pacific Company. The independent and integral rates of the Texas and Pacific Company are not complained of, and are not in issue. If it is proposed that the decree of this Court shall reach the matter in issue, and shall correct joint rates which may be found to be unlawful, then the parties whose joint action is complained of, whose joint action is necessary to accomplish the correction, and whom the decree of the Court must affect jointly *if correction of the rates, and not prohibi-*

tion of the commerce, is the object of this proceeding, must be before the Court.

We, therefore, urge :

III.

There is a defect of parties, in that the Southern Pacific Company is not a party to this proceeding.

The complaint is of an unlawful adjustment of the inland proportion of the through rate and the exclusively inland rate—the inland carriage in both cases being from the port of New Orleans to San Francisco—over the rails of the Texas and Pacific from New Orleans to El Paso, and of the Southern Pacific from El Paso to San Francisco. The local rate from New Orleans to San Francisco and the inland proportion of the through import rate (between the same places) are jointly made and shared by these two companies, as appears by their joint tariffs filed with the Commission ("Exhibit 36" to the Petition, Rec., p. 132).

The Southern Pacific Company is not made a party to this proceeding.

The Commission has repeatedly held that it would not undertake the investigation and revision of through rates in the absence from the record of any company participating in the rate. In the present case the Southern Pacific Company was a party to the proceeding before the Commission. It participates with defendant in the joint rates which are the subject of in-

quiry here, and in respect to which this Court is asked to make a decree. This proceeding is in effect a new trial of the matter originally tried by the Commission. It is a proceeding *de novo*. Nothing is concluded by the findings and judgment of the Commission—not even the facts. If the Commission, in proceedings wholly inconclusive, will decline to pass upon questions involved in a joint rate without the presence of all parties to the rate as parties to the record, it is not to be supposed that the conclusive judgment of this Court can be successfully sought in a proceeding against a single defendant charged with participation in such a joint contract. That every party to a joint contract is a necessary party to a proceeding to annul it will scarcely be questioned, but the rule applies with peculiar force, and with obvious reason, to the present case. It is well illustrated in the opinion of the Commission, delivered by Judge COOLEY in the case of *Allen vs. Louisville, N. A. & C. R. R., Co., 1 I. C. C., Rep. 199.* He said:

"When complainants desire to test the justice or legality of the through rates from Frankfort to New York, the necessity of bringing in the parties who make the rates, not for forty-six miles merely, but for whole distance, is obvious. They must be brought in, first, because they have a right to be heard, and, second, because an order made and purporting to control their action when they were not parties would be improper on its face and in a legal sense ineffectual. If such an order could have any effect as against the initial road, it would only be to prevent its agent naming to shippers when they called for it an aggregate through rate; it would not prevent its making the same rate as now to South Wanatah, nor preclude the connecting road from making rates independently from South Wanatah eastward."

Is it not manifest that these considerations apply ac-

curately to the present case? The necessity of making the Southern Pacific Company a party is equally "obvious." Clearly, it has a right to be heard. A revision of the through rate by order of this Court would be an attempt to control its action where it is not a party, and would be, as we submit, in the language of Judge COOLEY, "improper on its face and in a legal sense ineffectual." Of course, the real object of the original complainant (The New York Board of Trade and Transportation) to drive the defendant out of this import business and to secure a practical monopoly for New York jobbers and middlemen (and there is scarcely an attempted concealment of this purpose)—will be apparent; but if we accept the ostensible purpose as the real one—that is, that the proceeding is brought to regulate the relation and adjustment of the joint rates made by the Texas and Pacific and the Southern Pacific for the through inland haul of import traffic, and traffic originating at the port of New Orleans, respectively; then is it not clear that, "if the order could have any effect as against the initial road" (the defendant here), "it would only be to prevent its agents naming to shippers, when they called for it, an aggregate through rate." A revision of these through rates cannot be accomplished in a proceeding to which the Southern Pacific is not a party. All that can be accomplished here (and we submit that this much cannot be accomplished upon any just principle or admitted rule) would be to require the defendant to retire from its contracts for through joint rates, the effect of which would be to take this business from it, and to rescind and annul the interest of the Southern Pacific in these joint-rate contracts.

The Commission has repeatedly announced and applied the rule urged here.

In the case of *Michigan Congress Water Co. vs. Chicago & Grand Trunk Ry. Co.*, 2 I. C. C. R., the Commission said:

"We have repeatedly decided that we can make no order on a question of rates when the necessary parties are not before us. In *Allen vs. The Louisville, New Albany & Chicago Railway Company*, 1 I. C. C. Rep., p. 199, we held that all the roads constituting the line which makes the through rates complained of should be parties to the complaint which seeks to compel a reduction of the through rates. Again, in the case of *Harwell vs. The Columbus and Western Railroad Company*, 1 I. C. C. Rep., p. 237, we held that the parties affected are entitled to be notified in case a change in rates is asked; and that we would not make an order correcting an alleged unjust discrimination, unless the proper parties were before us.

"And again, in the case of *Riddle, Dean & Company vs. The Pittsburgh and Lake Erie Railroad Company*, 1 I. C. C. Rep., p. 490, we decided that where the relation of any carrier to the matter complained of is such that it is in whole or in part materially responsible for the alleged grievance, and has a direct interest in any investigation of the subject matter involved, that carrier should be a party to the proceeding, and if not a party no relief can be given against it. The rule as to proper parties in such a proceeding as this is plain, simple and elementary."

Under its rulings the Commission would not have undertaken to make any order in the present case without the presence of the Southern Pacific Company. The order of the Commission affected the joint rate—the "*aggregate rate*"—for inland carriage. It was directed against the Southern Pacific Company as well as against the present defendant. It was a *joint order*, so to speak (Rec., pp. 129–131). The present proceeding has *no other scope or purpose than the enforcement of that order.* A duplicate of the proceeding before the Commission (as contemplated by the statute)

cannot be had in this Court, nor can the order of the Commission be enforced by its decree under a record so defective in respect to parties that the Commission itself could not upon a similar record have made the order originally.

These propositions are emphasized by the consideration that the statute deals with the *rate in the aggregate* —not with *proportions or fractions of a through rate.* In the case of Detroit Board of Trade vs. The Grand Trunk R. R. of Canada, 2 I. C. C. R., 315, the Commission said :

> " The service in each instance is a unit. That unit in the case of the long haul cannot be split up with any justice or fairness, so as to say that less is charged, for example, upon that portion of it between Chicago and Detroit, than is charged upon a shipment over the same line originating at Chicago, and terminating at Detroit. Each is a separate, entire and distinct service, and, for the purposes of any just comparison, cannot be apportioned in this manner. *The rate in each instance is an 'aggregate rate,' and it is the 'aggregate rate,' as such, with which the statute deals.*"

In the present case the Commission has not deemed it necessary to show what the *proportion* of the wholly inland rate or proportion of the import rate received by the defendant is less than its regular inland or local tariff for carriage over its own lines. It was considered enough to show that the inland proportion of the through rate from London or Liverpool to San Francisco, and the local rate from New Orleans to San Francisco, constitute an alleged unlawful adjustment. As has been shown, there is no charge or intimation that the defendant exacts for its own service in carrying import traffic from New Orleans to El Paso (its entire line over which this business is carried) a less sum than it exacts under its local tariff for the same

carriage. If the present proceeding dealt with the relative adjustment of import and local rates to points on the line of the defendant Railway Company, this proceeding would be complete, but no complaint of any such adjustment is made. The relief cannot be adapted to correct adjustments not complained of; it must deal with those presented, and in this case this Court cannot revise the joint rates involved, it cannot properly make an order or decree designed to affect "aggregate through rates," between New Orleans and San Francisco without the presence of the Southern Pacific Company.

We feel safe in assuming that this Court will not, upon the present record, affirm a decree against the defendant, the only possible effect of which would be to drive it out of its valuable import business. The Court will not fail to see that the *ostensible* purpose of this proceeding is its only *legitimate* purpose, *i. e.*, the correction of an alleged unlawful adjustment of joint rates. Without the presence of parties sufficient to make its decree effective to acomplish this legitimate purpose, the Court will not affirm a decree sounding to that end, but in reality operating to abolish the business itself.

The Circuit Court and the Circuit Court of Apeals held that the Southern Pacific Company was not a necessary party to this proceding. This holding was based upon what seems to us to have been a clear fallacy. Judge WALLACE assumes that this case is brought for the purpose of restraining a wrong-doer from the continued commission of wrongful acts (Opinion, Rec., p. 163). The same assumption seems to have been indulged by the CIRCUIT COURT OF APPEALS (Opinion, Rec., pp. 180, 181). But the proceeding is an equitable proceeding instituted for the purpose of correcting an adjustment

of joint rates, and a decree made in the absence of one of the parties to the joint rate contracts would not be co-extensive with the issues of the case or the pretended purposes of the proceeding. The order made by the Commission and sought to be enforced by this proceeding, was, by its terms (and necessarily so), made operative upon both of these carriers. An order issued against one of these carriers in a separate and independent suit against it, purporting to enforce the order of the Commission, would be obviously ineffective, as obedience to it would require voluntary action upon a party not concluded by the decree. The proceeding is in its essential aspects a civil proceeding, and the ordinary rules governing the bringing in of parties are applicable, from a practical as well as a legal stand-point.

We submit that this proceeding should be dismissed upon this ground.

IV.

The construction of the act to regulate commerce, in its application to this case and to its facts.

IN CONSTRUING THE ACT TO REGULATE COMMERCE in its application to the present case several considerations will be found to be of fundamental importance :

1. This proceeding is instituted for the purpose of correcting an alleged unlawful adjustment of joint through rates on traffic imported from Liverpool or London to San Francisco, the claim being that the

charge for the inland carriage should be the same as the regular inland or local joint tariff for carriage from the port of New Orleans to San Francisco. The practice of making through joint rates and through bills of lading from London to San Francisco is not complained of. The Commission holds that such rates and bills are within the contemplation of the act, and the effect of its decision is that import traffic brought from any place in a foreign country to any point in the the United States through a port of entry in the United States or in an adjacent foreign country—even though the point of destination is in the State through whose port the traffic is brought in, and hence, even though no interstate line is crossed—is commerce within the purview of the act and within the scope of its regulation. This case, therefore, is brought for the purpose of compelling the defendant to charge its regular inland or local rate as its PROPORTION of a *joint through import rate.* The case goes to the *proportion or fraction of a through rate*—it does not deal with an *independant or integral rate.*

2. In the present case, the facts stated in the defendant's answer (except the allegation that its principal office is in Texas, as to which there was already an adjudication in this case) are conceded to be true; and it is conceded that the defendant has complied with all the requirements of the Act to Regulate Commerce and of the orders of the Commission, except the alleged requirements of the Act in relation to the adjustment of its import and domestic rates and the order of the Commission covering this adjustment—that is to say, the defendant has done every act in respect to its joint rates which the law requires it to do. Hence, unless

in the matter of the joint rates complained of it is subject to other conditions than those which attach to other joint rates, and is denied privileges and latitude which it may exercise with respect to other joint rates, the order of the Commission was beyond its powers and covered matter over which it was not invested with jurisdiction.

3. It is settled law, both as a matter of common law and of statutory construction, that no unlawful discrimination arises out of the charge of a less amount per mile for a long haul than for a short one included within the same mileage.

Union Pac. Ry. Co. vs. U. S., 117 U. S., 355.

Hull, &c., Dock Co. vs. Yorkshire, &c., Iron Co., 18 Q. B. Div., 761.

In re Lancaster and Nashville R. R. Co., 1 I. C. C. R., 65.

It is the settled construction of the Act to Regulate Commerce that the rates therein contemplated—integral rates and joint through rates—are in each case units; that a comparison between such rates is the comparison of units, and that an inquiry into the divisions of the aggregate through rate for the purpose of testing its relation to a local rate is inadmissible.

Detr. Bd. of Trade vs. Grand Trunk R. R. of Can., 2 I. C. C. R., 315.

See, also, Mr. Justice BREWER'S opinion in Chicago & N. W. Ry. Co. vs. Osborne, 52 Fed. R., 912 (Post, p. 74).

It is the settled construction of the Act that the long and short haul clause (Section IV.) is not violated by charging a local rate equal to the aggregate through

rate, or, stating it otherwise, that no such violation arises where the aggregate through rate is as low as the local rate covering a fraction of the aggregate mileage. Thus (to suppose a case), the long and short haul provision of the act would not be violated by the N. Y. Central R. R. Co. charging the same rate from New York to Buffalo as the through rate over the same line from New York to San Francisco; or, stating it otherwise, that the rate from New York to San Francisco via N. Y. Central would not be in violation of Section IV. if as low as the local rate between New York and Buffalo. If the charge for the aggregate through service and for the local service are the same there is no violation of the act; and if the charge for the aggregate through service is LESS than the local rate there is still no violation, *provided the circumstances and conditions of the two services are substantially dissimilar.*

In the present case the petitioner necessarily concedes that the facts stated in the answer of the Railway Company are sufficient to justify a lower through rate from London or Liverpool to San Francisco than from New Orleans to San Francisco, *if the competition upon which the defendant relies, as showing diversity of circumstance and condition as between the two classes of shipments, may be considered by the Commission.*

4. The act prescribes the same conditions and requirements in respect to all joint rates within its contemplation.

5. In this case the findings of the Commission, except so far as they sustain the allegations of defendant's answer, are not entitled to consideration. The

present hearing is upon bill and answer, and no findings of the Commission adverse to the defendant may be considered in the absence of opportunity to introduce evidence in contradiction. The findings of the Commission, upon trial of the issues, are *merely prima facie* evidence, but upon such a hearing as the present, involving only the sufficiency in law of the defense presented, the answer is taken to be true, and any conflicting findings of the Commission are excluded from consideration. Recent cases:

Interstate Commission vs. Lehigh Val. R. R. Co., 49 Fed. R., 177.

Interstate Commission vs. Atchison, Top. & S. F. Co., 50 Fed. R., 295.

VIEWS OF THE COMMISSION.

The Commission finds sanction for its construction of the Act in certain expressions used by the chairman of the Senate Select Committee in opening the debate upon the original bill in Congress (Report of Commission, Rec., p. 104). The language to which the Commission refers is obviously not intended as an exact definition of the scope of the act. Methods of transportation clearly within the contemplation of the act and the jurisdiction of the Commission—waterways used in connection with railroads—are not even referred to. Moreover, it seems to us clear that the expressions thus used, even if admitted to exactly define the chairman's understanding of the scope of the act, not only do not sustain, but scarcely give color to the Commission's construction. However this may be, the Courts have repeatedly held that the utterance of members in

congressional debate are not guides in construction of statutes.

United States vs. Union Pac. Ry. Co., 91 U. S., 72.
Aldridge vs. Williams, 3 How., 9.
District of Col. vs. Washington Market Co., 108 U. S. 243.

Upon a careful examination of the opinion of the Commission it will be found that it rests the validity of its order upon three propositions adopted by it in its construction of the Act to Regulate Commerce.

FIRST. That by the language of the Act the field of regulation is confined to transportation between ports of entry in the United States or in an adjacent foreign country to a point of destination in the United States; and its argues that neither it nor the carriers may consider, in justification of rates, any conditions arising outside of this field of regulation.

SECOND. That an assumed difficulty, by reason of frequent fluctuations in ocean rates, in filing and in making adequate publication of joint through import tariffs, has a bearing upon the construction of the act as applied to the rates here complained of.

THIRD. That the protective features of tariff laws have some significance in the construction of the act.

All parts of the opinion of the Commission bearing upon the present case, or the considerations involved in it, will be found between pages 103 and 113 of the printed Record. The remaining portions of the Commission's opinion deal with special contracts, arrangements and tariffs of the Pennsylvania Railway Company, the Grand Trunk Railway Company of Canada

and the Canadian Pacific Railway, and with the nature and legality of "commodity tariffs" or "commodity exceptions."

THE FIELD OF REGULATION—ITS RELATION TO THE CONSIDERATION OF CIRCUMSTANCES AND CONDITIONS.

It is not contended that it was not the purpose of the Act to regulate commerce *with foreign nations*. It is admitted that the act has this purpose and scope, but it is urged —and this will be found to be the whole claim and theory of counsel for the Commission in his construction of the act — *(a)* that in the adjustment of joint through rates *American carriers may not consider conditions which arise beyond the territorial jusisdiction of Congress and the Interstate Commerce Commission*, and *(b)* that where a shipment originates in a foreign country all of the competitive conditions that attend the transportation from point of origin to point of destination are to be *conclusively deemed to be localized at the point of origin*, and hence to be excluded from the consideration of the carrier in the adjustment of its joint rates, and from the considerstion of the Commission in revising the rates of the carriers. We question both of these propositions.

In its opinion in the present case, the Commission, discussing the scope of the Act in its relation to foreign commerce, said:

"The power of Congress to enact such legislation has always been deemed plenary under the grant contained in Section 8 of Article 1 of the Constitution of the United States and requires no discussion now. Between the parties to this contention there is no difference of opinion that the *importation of traffic on through bills of lading by continuous carriage, ship and rail, from the ports of Europe or other foreign*

countries to points within the United States is a transportation the regulation of which is provided for by the act to regulate commerce. The differences between them indicated in this contention relate to the methods of such regulation, the extent of that regulation and the operation of the statute in "regard to it" (p. 105).

And referring to the "field of transportation to be regulated as well as the carriers who were to be supervised in the administration of the statute," the Commission said (p. 104):

"That part of this field relating to foreign commerce was the transportation of this commerce between the port of entry and the place of destination upon the through bill of lading, such place of destination being in the United States, and *such port of entry being* EITHER *in the United States or in a foreign country adjacent to the United States.*"

We therefore find the Commission asserting the proposition that if the commerce is carried on the high seas that part of the transportation is not within regulative provisions of the act, but that the same traffic is within those provisions in so far as it is carried from a port of entry *in an adjacent foreign country*—the Commission disregarding the considerations of territorial jurisdiction so far as the carriage in an adjacent foreign country is concerned, while applying these considerations as conclusive where the carriage is upon the high seas to a domestic port or a port in an adjacent foreign country. Counsel for Commission does not admit the correctness of the Commission's construction of the act. He has argued, and will probably again argue, with much emphasis that the power to regulate extended only, and in all cases, to the boundary of the United States, and that the consideration of competive conditions is confined within the same limits.

The Commission's construction of the act involves the inconsistent proposition that Congress may regulate carriage in an adjacent foreign country, but it may not regulate ocean carriage. In this construction, clearly enough, territorial jurisdiction cannot be the test. The Commission claims that the right to regulate begins at the port of entry in the United States, but the phraseology of the first section is this :

> " And also to transportation in like manner of property * * * shipped from a foreign country to any place in the United States and carried to such place from a port of entry *either* in the United States or in an adjacent foreign country."

If the limit of regulation is prescribed by this clause, the regulation must be from the port of entry in an adjacent foreign country as well as from a port of entry in the United States, for the language does not distinguish in this respect between these ports. The act cannot be construed as contemplating the division of the rate and the division of the service at a port of entry in the United States without admitting that the rate and service would be in like manner divided at a port of entry in a foreign country. It is therefore manifest that the argument that territorial jurisdiction limits the right to regulate, and the argument that the port of entry is the dividing point for purposes of regulation, are wholly inconsistent.

The application of the act to *transportation* is not limited to *the field of regulation.* The act applies to all described transportation, and transportation is defined (Sec. 1) as including all " instrumentalities of shipment or carriage." It is the word " *transportation* " which is used in the last part of the first clause, and it is used in this connection :

"The provisions of this act shall apply * * * to the transportation in like manner *(i. e.*, partly by railroad and partly by water, when both are used under a common control or management for a continuous carriage or shipment*)* of property * * * shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or in an adjacent foreign country."

When it is considered that the *common carriers* to whom the act is applicable are particularly described in the first part of the clause, and that the description then shifts to *transportation* in the latter part of the clause, and that in the succeeding clause the term "transportation" is defined to include "all instrumentalities of shipment or carriage," there can remain no possible doubt that the Act to Regulate Commerce applies to this through transportation from the foreign country to an interior point in the United States, whether passing through a domestic port of entry or a port of entry of an adjacent foreign country. The principles involved in the law and applicable to any other species of transportation are, in like manner, applicable to this particular species of transportation. The through transportation is regulated by the regulation of the participating carriers who are directly subject to the act. This is the scheme of the act. Throughout the statute it will be found that the transportation to which it is applicable is not that alone which the carriers subject to the act perform independently, but includes that in which they participate with carriers *not subject* to the act. A careful distinction between the *carriers subject to the act*, and the transportation affected by the act, is maintained throughout.

The argument of the Commission that the circum-

stances and conditions (the competition of other lines not subject to the jurisdiction of the Commission) are circumstances and conditions which arise exclusively at the point of origin of the shipment and run their full course when an American port or a port of entry in an adjacent foreign country is reached, will not stand the test a practical examination. If competitive conditions affecting through shipments from London or Liverpool to San Francisco are deemed to arise and exist exclusively at London or Liverpool and to have run their full course when New Orleans is reached; and if it is claimed that from the Port of New Orleans a new set of conditions and circumstances arise to the exclusion of those which have determined the route from the foreign port, then it must be manifest that the shipment will never reach the Port of New Orleans, and that no case will ever arise for the application of the extraordinary rule that circumstances and conditions—intangible elements of competion for through business—may be localized, and that they do not run with or affect the transportation from the point of origin to the point of destination.

We cannot understand how the Commission could have reached the conclusion that the competitive conditions as between the ocean route around the Horn, the ocean and Isthmus route, the New Orleans route, and the Canadian route, all arise at the foreign point where the shipment originates. The competition is between the various lines of transportation *as entireties* and is made by the rates offered by the several companies composing the respective through lines. If the competitive bidding for traffic (which is merely the *manifestation* of the competition) gives to the *conditions* a "local habitation," then the competition would be localized

at San Francisco if the shipment were an importation by a San Francisco merchant, or they would be localized at London or Liverpool if the shipment were an exportation from one of those points to San Francisco by a London or Liverpool merchant.

DISCRIMINATION.

It will be borne in mind that the only pleading before the Court alleging *discrimination* is the original petition before the Interstate Commerce Commission, in which the Pennsylvania, the Pittsburgh, Fort Wayne and Chicago and the Pittsburgh, Cincinnati and St. Louis Railroad Companies were charged with discriminating against New York and Philadelphia and against New York and Philadelphia companies, firms and corporations, by the carriage of *import* traffic received through these two ports and destined for Chicago, at lower rates than those charged for like traffic *originating* at these ports and destined to Chicago. The Texas and Pacific Railway Company has no line to either New York or Philadelphia, and it will not be contended that the adjustment of import and local rates in which it participates can by possibility constitute a discrimination against New York or Philadelphia, or against the merchants, importers or jobbers of either of these ports. If in this proceeding discrimination is impliedly charged, it must be deemed to be charged as against jobbers and middlemen of New Orleans; and, in this view, we have here the novel spectacle of the New York Board of Trade (representing the jobbers and middlemen of New York City) contending, in the name of the Commission, that the New Orleans jobbers and merchants should be protected against alleged dis-

crimination, of which no New Orleans jobber or merchant complains.

Does this adjustment of rates involve a discrimination against New Orleans or its importers, jobbers or middlemen? We submit that manifestly this is not so. The facts contained in the answer—and upon this inquiry these facts must be deemed to be true—show that the rates for this import traffic between Liverpool and San Francisco are rates made in competition with lines which do not pass through the port of New Orleans; that the rates so made are the only rates at which the business can be secured, and that, hence, if the defendant is compelled to desist from the carriage of this traffic, except upon an inland proportion of a through rate which will correspond to its local rate, the traffic will be lost to it and diverted to lines not subject to the jurisdiction of the Commission and not passing through the port of New Orleans. The traffic would thus be lost, not only to the defendant Railway Company, but to New Orleans. Obviously the order of the Commission, if enforced by a decree of the Circuit Court, will work detriment and not benefit to the port of New Orleans. It is equally clear that the jobbers and middlemen of New Orleans—for whose well-being the New York Board of Trade exhibits an uninvited and, we think, a mistaken solicitude—would not be gainers by the enforcement of this order. Their absence as complainants in this proceeding indicates that they have the intelligence to perceive this. Every pound of traffic from Liverpool or London to San Francisco would, under the enforcement of this order, reach the latter point upon the same rates as those now in force over the line of the defendant company, but would reach that point *by other and different*

channels. A change of channel for this commerce would not relieve the conditions of competition to which New Orleans merchants are subjected, assuming such competition to exist—a fact which is not alleged. We think the proposition too clear for argument that this proceeding is not in the real interest of New Orleans or of its merchants—and this interest is the only interest which this Court may properly consider upon this hearing, so far as relief is sought upon the charge of discrimination. If the local rate between New Orleans and San Francisco is in itself a reasonable rate *(and there is no charge or pretense that it is otherwise),* neither New Orleans nor its merchants can complain that the Texas and Pacific Company secures, at a lower rate, *traffic which would otherwise reach San Francisco, at the same lower rate, but by other lines of transportation.*

The only question involved is whether defendant may participate in this business, not whether the traffic will reach its destination at the rates which the defendant meets.

We have shown that the participation of defendant in this business involves no discrimination when the term "discrimination" is used in its broad and general sense. Even more clearly is this so when the term is restricted by the conditions of the 2d clause of the act.

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, *by any special rate, rebate, drawback, or other device,* charge, demand, collect, or receive from any *person or persons* a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or

them *a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of *unjust discrimination*, which is hereby prohibited and declared to be unlawful."

It cannot seriously be contended that the defendant has violated this section of the act. Its rates are open, published and available to all—equally available to the importers of San Francisco, to all citizens of this country, and to the foreign exporters to this country. There is no concealment; no "rebate" or "device;" no special privileges; no refusal to perform the same service for all persons upon the same terms; in short, this is a case where the defendant—an American railway—is competing with foreign lines for the carriage of import business into this country, and it openly offers to all persons the same open and published rates for the carriage of this business. In other words, the defendant does not "charge, &c., any person or persons any greater or less compensation" for this service (*i. e.*, carriage from London or Liverpool to San Francisco) than it "charges, &c., any other person or persons for doing for him or them a like and contemporaneous service" (*i. e.*, carraige from London or Liverpool to San Francisco). Every person may have this service at the same price. There is, therefore, no unjust discrimination.

The language of Judge COOLEY in the case of *Crews vs. The Richmond and Danville R. R. Co.*, 1 I. C. C. R., p. 401, is a clear exposition of this:

"Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action, which, in itself, is impartial. This requires no argument; the statement itself is conclusive. A regulation that is general and

uniform is the opposite of discrimination. If the result is favorable to some localities and unfavorable to others, we may regret the fact, but we cannot, under any authority the law has conferred upon us, interpose to change it."

Undue Preference.

In the language last quoted Judge Cooley dealt also with the "undue preference" clause (Section 3), extending this principle of construction to the provision prohibiting the preference of one "place" over another, while Section 2 ("Unjust Discrimination") relates to the preference of "any person or persons" over "any other person or persons."

What we have said under the last foregoing head applies equally to the "Undue Preference" clause of the act. That clause forbids "any undue or unreasonable preference or advantage," and "any undue or unreasonable prejudice or disadvantage" to be given to or directed against "any *particular* person, company, firm, corporation or locality, or any *particular* description of traffic."

It is manifest that this section (3) prohibits *favoritism*. It was directed against an abuse which had become general and recognized. It was designed to prevent the extension of peculiar privileges and advantages to some which were denied to others. It has no relation whatever to general and open regulations enforced upon the carriers by conditions beyond their control. The section is directed against the *voluntary* action of the carriers, and their selection of *particular* persons, &c., as the objects of favor or prejudice.

In *Ex parte Kohler*, 31 Fed. R., 315, Judge Deady said:

"The Interstate Commerce Act is intended, among other things, to prevent discrimination between long and short hauls, except where they are made under substantially dissimilar circumstances and conditions. In my judgment, Congress, in limiting the prohibition contained in Section 4 of the act against discriminating charges between long and short hauls, to cases where such hauls are made 'under substantially similar circumstances and conditions,' has recognized the rule laid down in *Ex parte Kohler* (25 Fed. Rep., 73) as a proper one. Freight carried to or from a competitive point is always carried under 'substantially *dis*-similar circumstances and conditions' from that carried to or from non-competitive points. In the latter case *the railway makes its own rates*, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is *willfully unjust*, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances are altogether different. *The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in Ex parte Koehler, 'abandon the field and let its road go to rust.'*

"Competition may not be the only circumstance that makes the conditions under which a long and a short haul are performed substantially dissimilar; but certainly it is the most obvious and effective one, and must have been in the contemplation of Congress in the passage of the act."

Commenting upon this language Judge Ross, in the case of *Interstate Commerce Commission against Atchison, Topeka and Santa Fe Ry. Co.*, 50 Fed. Rep., 295, said:

"The common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities, *created*, NOT BY ITS OWN ARBITRARY ACTION, *but by nature or by enterprises* BEYOND ITS CONTROL."

The third section of the act has no bearing whatever upon the present case.

We quote from the opinion of this Court in the case of Interstate Commerce Commission vs. Baltimore and Ohio R. R. Co. (known as the "Party Rate Case"), 145 U. S., 263—the unanimous opinion of the Court being delivered by Mr. Justice BROWN:

"In order to constitute an unjust discrimination under Section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; *but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.'* * * *

"In this connection we quote with approval from the opinion of Judge JACKSON in the Court below: 'To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes between whom differences in charges are made, must be compared with each other, and *there must be found to exist substantial identity of situation and of service*, accompanied by *irregularity and partiality* resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

After quoting the clause of the English Tariff Act of 1854, from which the clause relating to undue preference in our own act was taken, and reviewing several English cases construing it, the learned Justice says:

"In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that ANY FACT *which produces an inequality of condition and a change of circumstances justifies an inequality of charge.* These traf-

fic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English Courts, and intended to incorporate them into the statute (McDonald vs. Hovey, 110 U. S., 619)."

THE DIVISION OF THE RATE AND SERVICE.

We have here a case which under the previous rulings of the Commission will be found to be unique. While the Commission requires our joint import rates to be filed in accordance with the act and to be published as required by its own order—while it treats these rates as in every other respect within all the requirements of the law and subject to all of its conditions—the Commission undertakes to fix the compensation of the inland carriers by a division of the joint rate and a division of the service performed. The Commission approves the making of joint import rates and the carriage on through bills of lading, but it treats the through rate as a unit and the through service as an entirety only in the application of *certain* of the provisions and requirements of the law, *i. e.*, requirements in respect to filing tariffs, &c., &c. But when the *conditions and circumstances* under which this business may be obtained and carried by defendant are to be considered for the purpose of justifying its rates, it says that those only shall be considered which would apply if the joint rate and service were divided at New Orleans and the shipment treated as originating at that port.

We quote again the expressions of the Commission

in the case of Detroit Board of Trade vs. Grand Trunk R. R. of Canada, 2 I. C. C. R., 202, expressions repeated in various forms throughout the reports of the Commission:

"The service in each instance is a unit. That unit in the case of a long haul cannot be split up with any justness or fairness so as to say that less is charged, for example, on that portion of it between Chicago and Detroit than is charged upon a shipment over the same line originating at Chicago and terminating at Detroit. Each is a separate, entire and distinct service, and for the purpose of any just comparison cannot be apportioned in this manner. The rate in each instance is an 'aggregate' rate, and it is the 'aggregate' rate, as such, with which the statute deals."

Where is there any warrant in the act for distinguishing in these respects the present case of joint rates and joint and aggregate service?

THE SIXTH SECTION. The Sixth Section provides for the posting of local tariffs at the depots and stations of the carriers upon whose routes the same are respectively in force. This section also provides for notice of advancements or reductions in these tariffs. It is further provided that:

"Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares and charges which shall have been established and published in compliance with the requirements of this section, and shall promptly inform said Commission of all changes made in the same." (This contemplates the filing of the individual tariffs of the carriers. The section proceeds): "Every such common carrier" (*i. e.* common carrier subject to the provisions of the Act), "shall also file with said Commission copies of all contracts, agreements or arrangements with any other common carriers in relation to any traffic af-

fected by the provisions of this Act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed by the Commission. Such joint rates, fares and charges on such continuous lines so filed as aforesaid, shall be made public by such common carrier when directed by said Commission in so far as it may, in the judgment of the Commission, be deemed practicable, and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem practicable for such common carriers to publish and in the places in which they shall be published."

The filing of joint rates is to be done by the carriers subject to the act. The requirement goes to all joint tariffs "over continuous lines or routes operated by more than one common carrier," without limitation or definition of the line or route or of the character of the other carriers. The contingency that publication of these joint tariffs might not be practicable, either in whole or in part, was contemplated by Congress, and in respect to these tariffs the measure of publicity, if any, is left to the judgment and requirement of the Commission. This exception in respect to the publication of joint tariffs is of controlling significance. It contradicts the inference drawn by the Commission from the supposed impracticability of making effective publication of through import rates. It will be observed that these provisions control the action of the *carriers who are subject to the Act* and who unite with others in forming a through or continuous line of route. The regulation is of these carriers and is effective to *the extent of their participation* in the

through or continuous service. This is demonstrated, if it requires demonstration, by the last clause of the Sixth Section, which provides that if any common carrier shall neglect or refuse to file or publish its schedules it shall be subject to mandamus and to injunction restraining it

> " from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of the Act, until such common carrier shall have complied with the aforesaid sections of this Act."

If the requirement of this section in regard to the publication of joint rates was not intended to cover the filing of joint import rates, and if carriage from foreign ports under arrangement for continuous transportation to interior points in this country is not within the contemplation of the section, the provision for an injunction restraining the carriers from transporting between ports of transshipment and of entry and the several States and Territories of the United States was wholly unnecessary. The Commission's construction of the act construes all meaning and purpose out of its peremptory provisions in regard to the filing and publication of these joint import rates. The filing of inland rates would, upon this view, have met the requirement of the act.

It is enough to say that the transportation from foreign ports to interior points in the United States is specifically provided for by the act; that the carriers subject to the act are required to file joint tariffs made with any other common carriers for the carriage " over a continuous line or route," to which line or route the

act sets no bound or limit. The Commission is not called upon to supply a limitation which Congress, dealing with this specific subject, has not enacted.

When a case arises in which it is impracticable for the carriers subject to the act to file their joint import tariffs or to publish them, as required by the order of the Commission, and where, in fact, these tariffs are not so filed and published, that case will arise under the sixth section of the act, and the course and remedy of the Commission is by that section clearly defined and prescribed. There is no other course or remedy. No such case is presented here, however. The Texas and Pacific Company has complied with the sixth section as to filing these tariffs, and there is no charge that it has failed to comply with any order of the Commission requiring publication.

The Tariff Laws.

It is argued that the construction of the act for which the defendant contends would nullify the tariff laws of Congress, and the Commission has apparently attributed some force to this argument. This is the first time that it has been suggested that the Act to Regulate Commerce is in any sense a protective measure.

It is not shown that the rates complained of are in conflict with the protective feature of any tariff. So far from this being true the Commission has found that New Orleans is almost without manufacturing interests, and no complaint of the effect of these specific rates upon any real or supposed manufacturing interests of New Orleans is made. Moreover, the answer denies any such effect, *and this denial is conclusive.*

We assume that before it can be successfully argued

that specific import rates are illegal or unreasonable because in conflict with protective tariff regulations, it must be shown that the commodities affected by those specific rates are also the products of domestic manufacture, and that the domestic manufacturer is in point of fact, *and not in abstract theory*, prejudiced by advantages given through these rates to the foreign manufacturer. Not only is no such situation alleged in this case, but the reverse of such situation is the conclusive showing of defendant's answer and the finding of the Commission. If an adjustment of import rates is shown in some specific case to operate as an undue prejudice and disadvantage to a domestic manufacturer, the case comes within Section 3 (undue preference and undue prejudice) or possibly Section 2 (discrimination) of the Act to regulate commerce. If such undue preference, undue prejudice or discrimination is found to exist, the rate will be corrected upon that ground, but if there are no manufacturers to be subjected to such undue prejudice or discrimination, then it seems to us too clear for argument that import rates will not be declared to be illegal or unreasonable, because the same adjustment of rates, if applied to other products in respect to which domestic manufacturers compete, would deprive the domestic manufacturer of the benefit of a protective tariff. Each case stands upon its own facts, and the questions which arise are completely covered by the "undue preference and prejudice" and the "discrimination" clauses of the act. Tariff regulations play no part even as analogies.

The effect of these joint rates is not to discriminate against localities, *but to put centres of distribution upon a parity.* A studious examination of the operation of

these joint import rates can result in no other conclusion. In this respect the practice of the railway companies in participating in this import business, upon such rates as they are compelled to make by reason of the competition of foreign lines, is not opposed to, but is rather in harmony with a long-established legislative policy, perhaps we may say a more settled legislative policy than the policy of protection. We refer to the policy of Congress in establishing interior ports of entry—interior points of distribution. This policy, conceived in the early history of our Government, and at an early stage of the commercial and territorial development of the country, has been illustrated and extended by numerous and consistent Acts of Congress. It dates back to the Act of March 2d, 1831 (4 Stats. at Large, 480), and is continued and enlarged under the Act of July 14, 1870 (16 Stats. at Large, p. 720) ; Revised Statutes, Sections 2990 to 2997 ; Act of June 10, 1880 (21 Stats. at Large, 173), and Act of February 23d, 1887 (24 Stats. at Large, 414).

The last section of the Act of February 23d, 1887, is of especial significance as an illustration of this policy.

Congress has encouraged the policy that bulk should not be broken at the seaboard when the shipment is destined to an interior point of distribution. The New York Board of Trade and Transportation contends for precisely the reverse of this. That organization proposes to levy a tax upon the commerce of the country, and to intrude itself into the business of interior importers. Its members pay only the low ocean rate upon their own importations. It proposes that interior importers shall be deprived *of the universally low through rate for continuous carriage from the source of supply*, and shall be compelled to buy their imports

at New York, thus superimposing upon the class of interior importers and distributors a further class of middlemen in New York.

This case is not brought for the protection of American *manufacturers* against preference or discrimination in favor of foreign producers. Let there be no wrong impression about this. It is not *protection;* it is *affirmative advantage* which is sought.

This case was originally brought by the "New York Board of Trade and Transportation," essentially an association of importers, jobbers and middlemen, and the scheme of the proceeding is to secure to New York a monopoly of importation and distribution of foreign production. The result of the Commission's order, if made effective by judicial judgment, would be to confer this monopoly, or to divert this commerce, from domestic to foreign channels—in the one case to build up and artificially stimulate a local business of importation at the expense of the importers of the entire country; in the other, to deprive American railways of this business and to turn it over to the transportation lines of foreign countries. Can it be that either of these results would be an achievement in the line of sound policy? Can it be that Congress aimed at any such results?

If the principles for which counsel contend are to be admitted, their consistent application will not be limited to the interests of New York and its importers and distributors. Every importing or producing point between New York and ultimate markets will be entitled to reach these markets at local rates corresponding to an exact proportion of the through rates from New York, and a revision of through and local tariffs over the entire country would be the just, logical and unavoidable result. Shortly stated, the just and logical result would

be that the through rates must not be less than the sums of the locals, a rule which the Commission has consistently refused to apply.

The right of intermediate producing points to insist on local rates corresponding to the local proportion of the through rate has been denied by the Commission, and it has pointed out the confusion which would result from the application of such a principle.

Rend vs. Chicago & N. W. Ry. Co., 2 I. C. C. R., 540.

See the case of

Rice vs. A. T. & S. F. Ry. Co., 3 I. C. C. R., 265 (Law. Co-op. Ed.).

Precisely this question was considered by the Commission in the case of *Martin vs. Chic., Bur. & Quincy R. R. Co.*, 2 I. C. C. R., 25, where it was claimed that through rates from Chicago to Nebraska points which were lower than the sums of the locals from Chicago to Omaha, and from Omaha to these points, operated as a discrimination against Omaha. The opinion of the Commission is well summarized in the syllabus, thus :

" A distributing centre, however great or important, cannot demand as a matter of right that the rates from a common source of supply to more distant and smaller towns shall be made up of the sum of the rate to itself, and the rate thence to such smaller towns ; but the carriers may make rates from the common source of supply to the smaller towns directly, as single rates, and if the single rate is less than the sum of the two which are made to and from the distributing centre, it is not for that reason necessarily objectionable."

See, also, *Crewes vs. Rich. & Dan. R. R. Co., 1 I. C. C. R., 401.*

Now a step further. The following illustration involves the same point, with the additional feature of the long and short haul clause (discussed more fully hereafter,

post, p.) : Tobacco is shipped from New York, and from Lynchburgh, Virginia, to New Orleans. The rail shipment from New York *passes through Lynchburgh.* The through rail rate from New York to New Orleans is 70 cents per hundred pounds. This rate is forced upon the rail carriers by the competition of ocean and gulf steamers. It is not a lower rate than the rail lines are compelled to make in order to obtain the business, and it is a rate which is remunerative in that it pays something over the cost of the service. Under the repeated decisions of the Commission such a rate is a reasonable and justifiable one. The rate from Lynchburgh to New Orleans upon the same article (tobacco) is 92 cents per hundred pounds. It is a reasonable rate, cost of service and value of service considered. If the principle contended for by the petitioner were a true one, then in the case supposed the Lynchburgh shipper of tobacco to New Orleans would be entitled to an order restraining the receiving company at Lynchburgh from charging a less sum as its pro portion of the through rate from New York to New Orleans than it charged him as its local rate from Lynchburgh to New Orleans. He might say (as the Commission has said in this case) that the competitive conditions determining the route of the through shipment were all localized at the point of origin and had run their full course when the intermediate point was reached, and that from that point on the shipment should be carried at the local rate.

The result in the case just supposed would be that all tobacco from New York to New Orleans would go by the water route. Lynchburgh would continue to meet the competition of the same lower rate from New

York, but the rail lines would be forced out of the through business.

The following cases are in point:

King vs. N. Y. & N. H., and N. H. & N. E. R. R. Cos., 4 I. C. C. R., 251, where a joint through rate of 9 cents per 100 pounds between New York and Boston, and a rate of twice that amount (18 cents per 100 pounds), being the sums of locals from New York to Readville, a town eight miles short of Boston on the same through line, were sustained by the Commission upon the ground that the long haul was in competition with water route.

Rice vs. Atch., Top. & Santa Fé Ry. Co. et al., 4 I. C. C. R., where the Commission, upon the same considerations, sustained these rates on oil: From New York to San Francisco and other California terminals (3,312 miles) 90 cents per 100 pounds; from Omaha to same terminals, the same rate; from Omaha to Ogden (1,034 miles, $1.25 per 100 pounds; from Omaha to points east of the California terminals, a rate progressively increasing up to $1.95.

Interstate Commerce Commision vs. Atch., Top. & Santa Fé Co. et al., 50 Fed. Rep., 295 where the Court (Ross, J.) sustained rates upon certain traffic from Missouri River points, St. Louis, Chicago, Cincinnati, Detroit and New York over the same line and in the same direction to San Bernardino, which were higher than rates to Los Angeles, San Bernardino being the shorter and Los Angeles being the longer distance.

Long and Short Haul Clause.

However much the argument may be elaborated, it will be found that this case, in the last analysis, involves the construction of the long and short haul clause of the Act to Regulate Commerce, and involves that alone. Admitting for the purpose of this argument that the Commission has some jurisdiction to make a general order of the nature of that of March 23, 1889, the sole question is this: Do the provisions of the fourth section extend to every species of transportation contem-

plated by the act? If the requirements of this section extend to all transportation within the purview of the act, we submit that the Commission may not enforce these requirements in respect to any class of transportation except upon the qualifications and within the limitations provided in this clause. That section, so far as it affects the present case, is this:

> Section 4. That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation *in the aggregate* for the transportation of passengers or of like kind of property *under substantially similar circumstances and conditions* for a shorter than for a longer distance over the same line and in the same direction, the shorter being included within the longer distance.

The relation of distance is the test and the distances are not fixed with any prescribed limits. The "line" is the through line of carriage, whether made up of one or more component parts, and whether the carriers subject to the jurisdiction of the act participate with other carriers subject to the same jurisdiction, or with carriers beyond that jurisdiction, in forming the through line. The definition of the first section of the act is conclusive upon this point.

This fourth section goes to the participation of carriers subject to the jurisdiction of the act in the adjustment of long and short haul rates or of through and local rates, and the injunction operates upon the carriers subject to this jurisdiction, only in forbidding them to participate in an adjustment of through and local rates which will violate its provisions. The carriers may charge "a greater compensation in the aggregate for the transportation * * * of like kind of property * * * for a shorter than for a longer distance over the

same line in the same direction" *under substantially dissimilar circumstances and conditions.* If the circumstances and conditions are diverse, such a relative adjustment of charges is legal, and the Commission has nothing whatever to do with the case. It may deal with the local and joint rates independently, if they are *per se* unreasonable ; but in such a case the law gives it absolutely no jurisdiction to control *the relative adjustment.* Competition of carriers who are not subject to the act has been so repeatedly held to constitute a dissimilarity of circumstances and conditions that the rule has become quite familiar. The law does not prescribe the nature of the circumstances and conditions. *Any* controlling or substantial circumstances and conditions existing in respect to the long haul, which do not exist in respect to the short haul, are within the meaning of the act *(Ex parte Koehler,* 31 Fed. Rep., 315; *Interstate Commerce Com. vs. At., Top. & S. Fe Ry. Co.,* 50 Fed. Rep., 295*).* There is no definition, no qualification. The law does not say that in order to constitute a dissimilarity the conditions and circumstances must arise at some point territorially within the jurisdiction of Congress or of the Commission. The Commission has said this, but it has said it without warrant or justification in the provisions of the act. It has read this qualification into the act.

Let us illustrate. Let us put a case in concrete form :

A train load of merchandise lies on the docks of Liverpool destined to San Francisco. The agents representing the various lines of transportation bid for its carriage. (We have an agent at London whose duty it is to protect and advance the interests of the Texas and Pacific Railway Company in just such

business (Rec., p. 82). The agents representing the line around the Horn, the Ocean and Isthmus line, and the Ocean and Canadian line, bid for this transportation unhampered by the requirements of the Act to Regulate Commerce and unembarrassed by the requirements of the Commission. It may be intelligently assumed that our agent, through considerations of superior speed and safety in the transit, which he may present, will be able to secure the transportation if he may bid for the business on the same terms as those offered by other and unhampered agencies of transportation. May he do this? May he do it lawfully? If not, why not? Is there any sound consideration of public policy to the contrary? There is none. We say this without qualification or doubt, unless an unfriendly finger may be pointed to some distinct prohibition in the Act to Regulate Commerce. Can any such prohibition be found? The act may be searched for it, and it cannot be found. American lines of transportation are bidding against the world for traffic destined to points within the United States. Is this in conflict with the spirit of the act? Does the act require the representative of an American railway to fold his arms and remain silent while the representatives of foreign lines of transportation are bidding for the carriage of this train load of merchandise from Liverpool to San Frrncisco? Does the act require him to abdicate his vantage ground and resign the shipment to foreign lines? The intelligence of the Commission has suggested no adequate reason why he should thus abdicate or resign. If a proper construction of the Act to Regulate Commerce puts us in this predicament, we may as well recall our agent from Europe. His usefulness there would be at an end if the Commission

make his rôle merely that of a spectator of the routeing of American traffic over foreign lines of transportation.

It is idle to talk about the "field of regulation," the "scope of regulation," or to attempt to artificially localize competition. It is more than futile to attempt to test the matter by a local competition at New Orleans, a point which, as the least practical mind will apprehend, the through shipment will never reach if such sophisms be applied. We believe the Courts will put an embargo upon transportation by American lines of railway only in reluctant obedience to some positive requirement of statute. They will not search and strain the statute for an excuse to do this. They will not resort to artificial and fanciful arguments. They will not substitute inference for positive law.

It may be summed up thus:

In respect to traffic between Liverpool or London and San Francisco the Texas and Pacific Company *meets the competition of carriers not subject to the Act.* In respect to the local business between New Orleans and San Francisco *it does not meet this competition.* It competes for the two classes of business under circumstances and conditions substantially dissimilar. A parity of rates would exclude it from one of these classes of business, and this class of business would be turned over bodily to foreign lines of transportation. There is no room for indefinite and impractical argument localizing these diverse conditions. They exist as palpable facts, and as such appeal to the practical mind. Their location, if they can be localized, is of no importance whatever. The law has not localized them. Their *existence* is the question, and the only question.

The defendant company and connecting lines carry

the through import business upon the terms enforced upon them by circumstances and conditions attending that business. They have the right to consider these circumstances and conditions and to adjust their rates accordingly. The law gives them this right, and the Commission may not take it away.

The Successive and Diverse Grounds of Decision Adopted by the Commission, the Circuit Court and the Circuit Court of Appeals Considered.

This case has been decided against the Texas and Pacific Railway Company by three tribunals—the Interstate Commerce Commission, the Circuit Court and the Circuit Court of Appeals. Had these decisions rested upon a uniform view, or proceeded upon a single principle, the array of decisions would have been formidable and discouraging. The decisions, however, are harmonious *only in the result reached.* The Circuit Court repudiated the basis of decision adopted by the Commission, and rendered a decision upon a novel ground, which, with deference, we submit was wholly untenable. The Circuit Court of Appeals repudiated the basis of decision adopted by the Circuit Court as well as that adopted by the Commission, and rested its decision upon a ground which, with the same deference, we submit was, if possible, even less tenable. The propositions adopted respectively by the Circuit Court and the Circuit Court of Appeals were of their own discovery and selection. Neither counsel for appellant nor counsel for appellee can claim the credit of suggestion.

These three several grounds of decision may be thus stated :

THE COMMISSION decided the case substantially upon the grounds :

1. That circumstances and conditions which may be treated as arising outside of the "field of regulation" may not be considered in justification of rates or rate adjustments.

2. That the protective features of tariff laws have controlling significance in the construction of the act in the case presented.

THS CIRCUIT COURT decided the case substantially upon the ground :

That competition, admittedly with foreign lines of transportation not subject to the requirements of the act to regulate commerce, or to the jurisdiction of the Commission, was not a circumstance or condition justifying diversity of joint import and inland rates.

The CIRCUIT COURT OF APPEALS decided the case substantially upon the ground :

That, conceding the inapplicability of the views of the Commission with respect to the localization of competition, &c., and conceding also that competition with foreign lines of transportation justified some such disparity in such rates, the disparity in the present case was too great, and that, in default of a better rule than the legislative requirement of the Commission as applicable to the present case, the Commission's requirement should be enforced.

The foregoing discussion in this brief has dealt particularly with the findings and opinion of the Commis-

sion. It remains to comment, but shortly, upon the decisions of the Circuit Court and Circuit Court of Appeals.

The Opinion of the Circuit Judge.

I.

THE CIRCUIT COURT MISCONCEIVED THE FACTS OF THE CASE, AND MISAPPLIED PRINCIPLES OF LAW HAVING NO APPLICATION TO ITS ACTUAL FACTS.

From the opinion of the Circuit Judge it appears that he had gained a mistaken impression in respect to material facts of this case. We are constrained to believe that its decision was made upon the assumption that the defendant's adjustment of import rates operated to the prejudice of the City of New York, of its manufacturing and importing interests, and of the original complainant—the New York Board of Trade and Transportation. This view is enforced by the language of the opinion, in which the import rates of the defendant company are compared with rates assumed to be those for inland carriage of traffic *originating at New York, Chicago and other points*, and carried through New Orleans via Texas and Pacific and Southern Pacific rails to San Francisco.

The Court said (Record, pp. 162, 163):

"It was shown that the ordinary tariff rates charged by the two companies upon traffic delivered to the defendant at New Orleans and shipped at New York, Chicago and other places in this country for carriage from New Orleans to San Francisco, were somewhat more that double the rates charged for carriage of similar traffic sent from Liverpool or London by through bill of lading to San Francisco via New Orleans. To illustrate; it was shown that the rates made by the two

companies, in conjunction with Liverpool vessel owners, by their bills of lading from Liverpool to San Francisco by the rails of the defendant from New Orleans to El Paso, were, per hundred pounds on books, on carpets and on cutlery, $1.07, while the regular tariff rates of the two companies upon the articles when sent to New Orleans from other places in this country were, per hundred pounds on books, $2.64; on carpets, $2.88; and on cutlery $3.26, and that the rates on these articles when shipped from Liverpool were 80 cents per hundred pounds for carriage from New Orleans to San Francisco."

As matter of fact, no such adjustment of rates as that assumed by the Court was the subject of controversy in this proceeding. The defendant company has no line of railway to the City of New York or to the City of Chicago, and no joint rates (if any such there be) from New York or Chicago to San Francisco, via the rails of this defendant, were shown. The controversy in this case, so far as the Texas and Pacific Railway Company is concerned, relates exclusively to the relative adjustment of import rates through New Orleans to San Francisco, and of inland rates from the City of New Orleans to San Francisco. *No proof in respect to any other adjustment of rates was adduced.*

We are not able to harmonize the opinion of the Court in this case with previous adjudications and with the then settled construction of the Interstate Commerce Act, except upon the theory that the assumed discrimination against New York and the original complainant (The New York Board of Trade and Transportation) was the controlling consideration in the decision of this case. Upon any other assumption we would have an attempted correction by that Court of a discrimination and prejudice to the City of New Orleans

and its merchants, of which neither that city nor its merchants complain, and notwithstanding that the answer of the Railway Company—the allegations of which must be taken as conclusive here—denies any actual discrimination against or prejudice to New Orleans or its merchants, and *avers that the adjustment of import rates is of positive advantage to New Orleans by reason of the fact that thereby the import traffic which would otherwise be lost to New Orleans is induced through and handled at that port.* To a proper understanding of the case it is necessary that the introduction of the Texas and Pacific Railway Company into this proceeding shall be understood :

This case was brought originally by the New York Board of Trade and Transportation against certain New York railroads, and the complaint was of an unlawful adjustment of import and inland rates on the part of those companies. The complainant alleged a direct interest in this adjustment and a direct grievance resulting from it. Subsequently it was suggested to the Commission that the import and inland rates of other railroad companies presented a similar adjustment, and these other companies were cited to answer the original petition. Among these companies was the St. Louis, Iron Mountain and Southern Railway Company, and in its answer that company suggested that the Texas and Pacific Railway Company was interested in the question involved, and should be heard (Rec., p. 29).

Acting upon this suggestion the Commission on April 21st, 1890, made an order, which appears on pages 42 and 43 of the record. After reciting that the Commission had reason to believe that other companies besides those named as defendants were engaged in carrying traffic imported from foreign countries at

lower rates than their published inland tariff rates, and after reciting "the Commission having authority to inquire into the management of the business of all common carriers subject to the provisions of the Act to Regulate Commerce, and to be informed as to the manner and method in which the same is conducted," it ordered that an inquiry should be made into the manner and method of carrying imported traffic by certain railroads, among which was named the Texas and Pacific Railway Company. It further ordered that each of said railway companies should file a *verified statement* setting forth whether on March 23, 1889, or since that time, "it has carried imported traffic, whether on through bills or otherwise, at lower rates than it contemporaneously charged for like traffic *not imported or not shipped on through bills*, and the reasons for such lower rates if charged." It further ordered that these railroads should appear at the hearing of the cause, give evidence, &c. *They were not required to answer the complaint.*

It thus appears that the original character of the proceeding, in so far as the Texas and Pacific Railway Company is concerned, was entirely changed, and that, as to this company, it became an investigation by the Interstate Commerce Commission, under its general statutory powers, as to the methods pursued by this company in carrying on business in imported traffic. This company was not required to answer the complaint, but simply to make a statement as to what it had been doing at any time since March 23, 1889, and at that time was doing, in the way of carrying imported traffic at lower rates than those charged for like traffic *not imported or not shipped on through bills.*

No petition was ever presented charging the Texas

and Pacific Railway Company with discrimination against any person or persons, corporations, firms or locality, or with having made or given any undue preference. Therefore, in so far as the Texas and Pacific Railway Company is concerned, the questions submitted to the Court were practically moot questions, and not questions actually arising out of any facts alleged in the original proceeding, or out of any complaint made by any person or persons claiming to have been aggrieved by any acts of the defendant.

No person or persons, corporations or localities, affected by the rates or the rate adjustments of the Texas and Pacific Railway Company, were brought into the proceeding, either directly or by any representation whatever. We understand counsel for the Commission to concede that the Texas and Pacific Railway Company is not even *impliedly* charged with unjust discrimination or with undue preference, *except as respects the City of New Orleans and its merchants and importers.*

If the present decision shall stand this Court will have undertaken to correct assumed injustice done to those who have not complained and who have never been heard, either directly or by any fair representation. If it be claimed that the New York Board of Trade and Transportation, the original complainant, represents the interest of New Orleans and of its merchants, the conclusive reply to such a claim is found in the antagonistic interest of this Board of Trade.

Neither the Commission nor any other stranger is entitled *sua sponte* to undertake the protection of interests which are satisfied and ask no protection. A stranger to New Orleans and to its business interests may not, notwithstanding the latitude of the Interstate

Commerce Act, undertake to manage the concerns of that city and of its merchants, to determine when and where they are prejudiced, and to institute and carry on proceedings in their behalf. New Orleans and its merchants alone have the right to determine whether or not they are injuriously affected by the relative rates of the defendant company from and through the port of New Orleans. THERE CAN BE NO SUCH THING AS DISCRIMINATION OR PREJUDICE TO NEW ORLEANS IN OPEN RATES WITH WHICH NEW ORLEANS IS SATISFIED.

It is obvious that New Orleans is benefited by this adjustment to the extent to which it handles the traffic imported through the port. This is an affirmative advantage and is so alleged. It is equally obvious that the order sought in this proceeding would not be corrective of any injury to New Orleans, but would actually deprive it of the advantage of handling a large volume of traffic. The Court below finds that the business would reach its destination at the same lower rates, *but not through New Orleans*. Does it require argument to show that it is better for New Orleans to handle the business than not to handle it? Is it debatable that the order of this Court, theoretically made to protect New Orleans from unjust discrimination and prejudice, would, in practical effect, operate to its injury, disadvantage and prejudice?

The provisions of the Act to Regulate Commerce were intended to prevent and to afford redress for actual and substantial grievances, and were not directed against cases presenting theoretical grievances.

II.

THE ADJUSTMENT OF RATES COMPLAINED OF IS AMPLY JUSTIFIED IN LAW BY THE FACTS PRESENTED BY THE RECORD AND CONCEDED IN THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court contains this (Record, p. 163):

"It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are in effect fixed and controlled by the competition of sailing vessels between those ports, and also by the competition of steamship and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the Act to Regulate Commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to advert, somewhat remunerative to the defendant, and it must also be conceded that the defendant would lose the foreign traffic by reason of the competition referred to, and the revenue derived therefrom, unless it carries it at the lower rates; and, by doing so, it is enabled to get a part of it, which would otherwise go from London and Liverpool to San Francisco around the Horn or by the Isthmus of Panama."

We submit that our right to maintain the import tariffs complained of is a legal sequence from these findings. Every element of our right to maintain these tariffs is here stated; and, when these elements are present, the lower rate for the competitive through business violates no provision of the Interstate Commerce Act.

The Commission and the Courts have repeatedly held that no violation of the long and short-haul clause, nor of the unjust discrimination clause, is presented by a tariff of rates for through carriage lower than for a

fractional haul over the same line, where the competition for the through carriage is for traffic important in amount, and is with lines of transportation not subject to the jurisdiction of Congress or of the Commission. That such competition with foreign lines of transportation takes a case out of any such inhibitions of the law is a proposition so well settled that we cannot suppose it was intended by the Circuit Court below to question it in this proceeding. From the earliest decision of the Commission there has been no diversity of opinion upon this point. *In re Southern Railway and Steamship Association* (one of the earliest cases before the Commission, June 15th, 1887), Judge COOLEY, delivering the opinion of the Commission and summarizing its decision, said:

"The points that are intended to be decided at this time are as follows:

"FIRST. That the prohibition in the fourth section against a greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as qualified therein, *is limited to cases in which the circumstances and conditions as substantially similar.*

"SECOND. That the phrase 'under substantially similar circumstances and conditions' in the Fourth Section *is used in the same sense as in the Second Section.*

* * *

"FIFTH. That the existence of actual competition, which is of controlling force in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

"1. *When the competition is with carriers by water which are not subject to the provisions of the statute.*

"2. *When the competition is with foreign or other railroads which are not subject to the provisions of the statute.*

" 3. In rare and peculiar cases of competition between railroads, which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition " (I. C. C. R., 278–291).

All subsequent decisions are in absolute harmony with this.

It therefore appears that there is no unjust discrimination involved in the defendant's adjustment of import rates and inland rates where the import rates are enforced by the competition (as found by the Court in this case) of lines of transportation not subject to the provisions of the Act to Regulate Commerce. In other words, the defendant company is not trammeled by any such provisions of the Interstate Commerce Act in its competition with foreign lines of transportation. *It was not the policy of the law to handicap American railways in their race for business with foreign lines.* The effect of the decision of the Circuit Court is that, without any advantage, *and with a positive disadvantage and prejudice to the interests ostensibly protected,* American railroads are driven out of the import business, and that business is turned over to foreign lines of transportation.

We confidently submit that to the practical mind this result would present itself as a " discrimination " against American lines of railway and a " preference " of foreign lines engaged in import and transcontinental business. We cannot believe that the Act to Regulate Commerce merits this commentary.

In this connection we repeat a quotation from the decision of the U. S. Supreme Court in the Baltimore and Ohio " Party Rate Case." After quoting the clause of the English Traffic Act of 1854, from which

the clause relating to undue preference in our own act was taken, and reviewing several English cases construing it, the Court said :

"In short, the substance of all these decisions is that Railway Companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that ANY fact *which produces an inequality of condition and a change of circumstances justifies an inequality of charge.* These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of '*undue preference,' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English Courts, and intended to incorporate them into the statute*" (McDonald vs. Hovey, 110 U. S., 619).

Baltimore & Ohio Party Rate Case, 145 U. S., 263.

There can be no such thing as unjust discrimination or undue preference in the absence of any proof or showing that some *particular* persons, firms, corporations or localities or classes of freight are the subjects of such unjust discrimination or undue preference. No such showing was made in this case, and there is absolutely no basis for a finding of unjust discrimination or undue preference. More than this, even assuming that there were proof identifying the party, locality or class of traffic injuriously affected by the adjustment of rates, the circumstances and conditions under which the two classes of service are performed are distinct and dissimilar, and take this case out of the operation of either the second or third clause of the Interstate Commerce Act (see the *Baltimore and Ohio Party Rate Case* above cited).

The last observation applies to this case as one in-

volving the long and short haul clause; and in this aspect of the case the matter is further concluded by the decision of the Supreme Court in the *Baltimore and Ohio Party Rate Case*, as well as by the consistent decisions at Circuit and in the Circuit Courts of Appeals.

Chicago & Northwestern Ry. Co. vs. Osborne, and Same vs. Junod, 52 Fed. Rep., 912.
Tozer vs. United States, 52 Fed. Rep., 917.
United States vs. Mellen, 53 Fed. Rep., 229.

We especially invite the considerate attention of this Court to the opinion of Mr. Justice BREWER in the case of Chicago & Northwestern Ry. Co. vs. John Osborne, 52 Fed. Rep., 912. This case was decided by the Circuit Court of Appeals in the Eighth Circuit, composed of BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges. An extended quotation from the opinion follows herein at page .

It is now the settled construction of the Interstate Commerce Act that joint rates and integral rates are not subjects of comparison, and that the one affords no standard of adjustment or test of reasonableness of the other.

This Court will readily perceive that the grounds upon which his Honor Judge WALLACE decided this case, and those upon which the Interstate Commerce Commission made the original decision, are wholly distinct, if not conflicting. The Interstate Commerce Commission rests its decision upon the proposition that circumstances and conditions *arising outside of the territorial limits of the United States* may not be considered in justification of such an adjustment of rates

as that presented by this case; and this view—the controlling view with the Commission—was announced by the Commission (as hereinbefore shown) notwithstanding that the Act to Regulate Commerce *provided no such limitation in the consideration of diverse circumstances and conditions.* On the other hand, Judge WALLACE decided the case upon the broad and general proposition that *competition* afforded no justification for the adjustment of rates complained of. It is true that under his mistaken apprehension of the facts of this case (which we have already pointed out), Judge WALLACE may have overlooked the character of the competition involved in the present case. But, if not so, a decision that competition with foreign lines of transportation could not be considered as an element justifying such an adjustment of rates is in direct conflict with the settled construction of the act both by the Commission and the Courts.

The Opinion of the Circuit Court of Appeals.

The reasoning of the Circuit Court of Appeals, by which it reached the conclusion that the order of the Circuit Court should be affirmed upon wholly different grounds than those upon which the latter Court rested its opinion, is found in the record at pages 177 to 180 inclusive.

It will be found that the whole sum and substance of the argument of the Circuit Court of Appeals and its *ratio decidendi* are, that the disparity presented in this case between inland rates and import rates is *too great.* While finding in effect that *some* disparity is

justifiable under the conditions presented in this case, it confirmed an inflexible order of the Commission prohibiting *any* disparity.

We submit with deference that the result is illogical and cannot stand.

The opinion dealing with the report of the Commission says:

"Its conclusion was that foreign and home merchandise under the operation of the statute, when handled and transferred by interstate carriers engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, charges and treatment for similar services rendered.

"This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be excluded from consideration under the operation of the statute, is an exceedingly important one, whose ultimate decision may have a wider influence upon the interstate commerce of the country that we can foresee. This legal question was not discussed in the export-rate cases, which was treated 'as one of practical policy.'

"We are not disposed to pass authoritatively upon this question, except in a case which demands it and in which the effect of this construction of the statute is naturally the subject of discussion. This petition presents a question of narrow limits, which relates only to the validity of the order so far forth as it concerns the conduct of the defendant in its joint rates for transportation of imported traffic from New Orleans to San Francisco, and is whether these rates subject domestic traffic between same points to an undue disadvantage.

* * * * * *

"But it will be urged that if it is assumed that ocean competition can create a dissimilar condition, it follows that it is a condition which may rightfully be regarded in establishing rates for import and domestic traffic, and that the order of the Commission which directed

equality should not be enforced *because some inequality* might be justifiable.

* * * * * *

"The final question before the Circuit Court was: 'Is the order of the Commission a proper one, and should obedience to it be insisted upon?' In order to decide that question the answer presented two questions upon the subject of rates: 1st. Can ocean competition be regarded in any event as creating a dissimilar condition? 2d. If it can, is the difference in the existing rates justified by that condition? A third question might have been, but was not, presented, viz: In the event that the first question is answered in the affirmative and the second is answered in the negative, does the dissimilar condition justify any end; if so, what dissimilarity in rates? To answer this question the Court should have been informed in regard to the reasonableness of existing rates upon domestic traffic.

"This Court is of opinion that, assuming that the first question can be answered in the affirmative, the second must be answered in the negative, and that an unfair inequality of rates is plainly manifest.

"There is nothing in the record which enables the Court to determine that the assumed dissimilar condition justified any substantial dissimilarity in rates, and it ought not to permit disobedience to an order until it can suggest a better one as a substitute."

The Circuit Court of Appeals, in discussing the issue of its own discovery *(i. e.*, the *extent* of disparity in rates*)* compares the inland and import rates on cutlery, etc., and finds that it was incumbent upon the defendant company to justify the extent of this disparity by an allegation in its answer in the present proceeding to the effect that its inland rates were in themselves reasonable; and it comments upon the absence of such an allegation, reciting the presence of this allegation in the original answer of the Railway Company to the petition of the New York Board of Trade and Transportation.

The reasons why no such allegation is introduced in

the answer of the Texas and Pacific Railway Company seem obvious, and they are these:

1. The petition of the Interstate Commerce Commission contains no allegation whatever charging that the inland rates were unreasonable, and an averment of unreasonableness would have been responsive to no charge whatever in the Commission's petition.

2. Having alleged in its original answer that the inland rates were reasonable, and no adverse finding upon this point having been made by the Commission, and the only charge of the Commission being that the Railway Company had failed to accurately conform its import to its inland rates, there was obviously no sense or propriety in defense upon a point upon which there was no attack.

That the inland tariffs upon such articles as cutlery and carpets are without significance might, of course, have been readily shown. It might have been shown that shipment of these articles seldom, if ever, originate in fact at the port of New Orleans. It is common knowledge that New Orleans does not compete with Sheffield in the manufacture of cutlery, nor with Kidderminster in the manufacture of carpets. These issues, however, have no relevancy, and the inland rates upon articles of this character (published, as they are, in large measure merely for the purpose of formally completing classifications) have no significance whatever. Had the inland rates of the railway company been questioned as unreasonable in themselves, or by comparison with any other rates, the defense of the Railway Company would have been made upon this

point ; but the *essential and very purpose* of this case is to test the legality of an inflexible rule of the Commission requiring EXACT *correspondence between inland rates and inland proportions of through import rates.*

The original issue tendered by the New York Board of Trade and Transportation in its petition to the Commission, and the issue tendered by the Commission in the present case, were studiously framed so as to present the single question of the propriety and validity of the Commission's general order of March 23d, 1889, and the propriety and validity of the particular order in this case making specific application of that general order *(ante,* p. 1*)*. It has been, and must be, a fundamental condition of this case upon the issues as presented and made, that the single question submitted to judicial decision is whether the diverse circumstances and conditions affecting the inland and import traffic respectively are actual and of such a character as to justify, under the provisions of the Interstate Commerce Law, ANY disparity in rates. The EXTENT of any such disparity is wholly immaterial. The reasonableness, *vel non*, of either the inland rate or the inland proportion of the through import rate, separately considered, is not an admissible factor under the issues as presented, or under judicial decisions having application to issues of this character. The very order of the Commission requiring the inland proportion of through import rates to precisely conform to the inland rate by necessity assumes, for the purposes of the order, at least, the reasonableness of the inland rate. Neither rate, considered separately from the other, has been, in any pleading or in any adduced testimony, questioned as unreasonable ; and it is a perversion of the issues in this case to hold, as the learned Circuit

Court of Appeals has held, that, granting the propriety of SOME disparity in rates, the DECREE OF DISPARITY presented in the present case was the subject of inquiry or justified an affirmance of the order of the Commission. If *any* disparity in rates is permissible, it must be obvious that an improper disparity can only be corrected in proceedings instituted to test the reasonableness *per se* (and not comparatively considered) of the particular rate complained of, whether that rate be the inland or the through import rate.

That is to say, if we are justified in our view that the actual difference in the circumstances and conditions affecting the import business from those affecting the inland business creates a dissimilarity of circumstance and condition within the meaning of the act, then the inland rate and the import rate are not subjects of comparison, and their relation is not a test of the reasonableness of either rate.

If the character of the competition, admittedly shown in this case, may be considered by the Commission and by the Courts in justification of *any* lower rate for import traffic (and this is apparently conceded), then this case falls clearly within the decision of Mr. Justice BREWER in the case of *C. & N. W. Ry. Co. vs. Osborne, 52 Fed. R., 912.*

We quote:

"SECONDLY. That, where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reason-

ableness of the local tariff of either line is determined. To illustrate: On the defendant's road, the distance from Turner to Chicago is 30 miles; on the Lake Shore line, from Chicago to Cleveland it is two or three hundred miles. The defendant company may charge 15 cents for transporting grain the 30 miles from Turner to Chicago, provided that be in fact only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland; and the fact that the rate on each line is 15 cents for the distance named will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 cents; less than the local tariff of either. That we may not be misunderstood, we do not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when the two companies, by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned.

"This proposition may not be as obvious as the former, and yet a careful study of the act leaves no doubt of its correctness. In the first section a definition is given of the term 'railroad,' which, in addition to bridges and ferries, includes 'also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease.' A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control over their own roads, or to unite in a joint tariff. 'Reasonable, proper and equal facilities for the interchange of traffic,' are commanded by the third section; but the proviso: 'This shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business.' No power existed at common law, and none is given by the act, to Court or Commission, to compel connecting companies to con-

tract with each other, to abandon full control of their separate roads, or to unite in a joint tariff (*Express Cases*, 117 U. S. 1, 6 Sup. Ct. Rep., 542, 628 ; *Kentucky & I. Bridge Co. vs. Louisville & N. R. Co.*, 37 Fed. Rep., 567 ; *Little Rock & M. R. Co. vs. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. Rep., 559). The whole matter is left to the voluntary action of the companies ; and, in forming by agreement any joint tariff, the basis of division and the proportion of moneys each shall take is also a matter left to their determination."

It must be obvious that the decision of the Circuit Court of Appeals irrevocably commits the Texas and Pacific Railway Company, in respect, at least, to all articles mentioned in Exhibit 36, to an exact conformity between its inland and its inland proportion of through rates, and this, notwithstanding the concession that some disparity between these rates is permissible. The Railway Company is thus concluded against right, justice and a proper construction of the Act to Regulate Commerce. On the other hand, the reasonableness of neither the import rate nor the inland rate in itself, having been made an issue in this case, a decision of the Court refusing to enforce this inflexible order of the Commission would not have left the Commission, nor any other parties at interest, remediless in respect to either the inland or the import rate, but either of these rates under such a decision would still be open to attack for intrinsic unreasonableness.

It seems clear that, having reached the conclusion that some disparity in these rates was justifiable, the Circuit Court of Appeals should have held the order of the Commission to be illegal and have left that body and the private litigants whom it represents to their adequate remedies in case of any just ground of complaint against either rate separately considered.

To summarize :

1. No party has alleged any grievance as against the Texas and Pacific Ry. Co.

2. The persons and localities credited with a grievance make no complaint, and under the allegations of the answer MUST *be considered as satisfied with and benefited* by the rate adjustment in controversy.

3. There is no charge, pretense or evidence that the inland rates are in themselves unreasonable, and they afford no standard for the measurement of through import tariffs made in competition with foreign lines of transportation.

4. Where through rates lower than rates for a fractional haul are made in competition with lines not subject to the provisions of the Act to Regulate Commerce, and affect traffic, important in amount, and merely secure to American lines traffic which would otherwise reach the American destination by foreign lines at the same lower rates, there is no violation of the first, second, third or fourth sections of the act.

5. There can be no unjust discrimination or undue preference resulting from any tariff of rates where *it is conceded that the situation of the party credited with a grievance cannot be improved by an abolition of the tariff*, and where the *exclusive result* of discontinuing the tariff would be a *loss of the business to the railway company.*

We trust that this Court will not feel impelled to affirm an order which will exclude the defendant from

the transaction of important business without compensatory advantage to any one entitled to the protection of the Court, and with benefit only to the foreign rivals of the defendant.

Respectfully submitted,

JOHN F. DILLON,

WINSLOW S. PIERCE,

For the Railway Company.

Office Supreme Court, U. S.
FILED
DEC 10 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 631.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Appellant,

against

THE INTERSTATE COMMERCE COMMISSION,

Appellee.

IMPORT RATE CASE.

Supplemental Argument for the Interstate Commerce Commission.

SIMON STERNE,
JOHN D. KERNAN,
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LAWRENCE MAXWELL, JR.,
SOLICITOR-GENERAL
for Appellee.

IN THE

Supreme Court of the United States,

October Term, 1894.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION,
Appellee.

Statement.

Without repeating the statement of facts presented in the argument prepared by Mr. Kernan, which is fully adopted herein, it is admitted upon the record (p. 158) that the defendant charges, demands, collects and receives, for the transportation of commodities from Liverpool and London, via New Orleans, by way of its and connecting railways, to San Francisco, and also from New Orleans, via the same routes, to the same destination, rates substantially as stated in Exhibit 36, referred to in the bill of complaint, and that it did so after the making and service of the report and order set forth as part of the complaint herein and annexed to the petition (p. 9 of Record), and made part of the petition as Exhibits 34 and 35 (pp. 64 and 129 of Record); and that it has disobeyed such order, and that it continues now, as in the past, to

charge, on traffic moving from Liverpool to New Orleans, and from New Orleans over the line of the defendant railroad, to El Paso, and there taken up by the Southern Pacific Railroad to San Francisco, the rates set forth in Exhibit 36 (page 132 of Record). Simultaneously, on like traffic, it charges the railway rates from New Orleans to San Francisco, via the same lines, as stated in said exhibit. This shows a preference in favor of the goods which move from Liverpool and London to San Francisco on the lines of such two railway companies, giving an advantage to the foreign produce, over the domestic produce and foreign produce not shipped on through bills, of from 50 to 200 per cent. in favor of the foreign products going on through bills of lading. The goods, whether starting from Liverpool or New Orleans, are shipped under like conditions and circumstances as to the traffic moving from New Orleans to San Francisco.

The defendant seeks to justify the charge that it violates the first, second, third and fourth sections of the Interstate Commerce Act, on the ground of the importance of the traffic which it otherwise would lose, if it did not make such a preferential charge in favor of the foreign traffic, and claims that the circumstances and conditions as to the origin of the traffic and as to the competitive elements surrounding it, are so dissimilar as to justify such a difference of rates (pp. 158, 159, 160 and 161 of the Record).

It admits, therefore, its disobedience of the order of the Commission. It admits the findings of fact of the Commission by not denying the same. It specifically admits the preferential rates made by it. It admits the service of the order upon it. It refuses to comply with, and openly avows that it is justified in disobedience to, this order by business conditions which it has a right to consider, irrespective of the Interstate Commerce law, in making its tariff rates, and

claims that the Interstate Commerce law virtually excludes traffic coming from foreign ports from its purview, because it is claimed that such traffic alters the circumstances and conditions under which it is brought to the railway.

This brings us to the consideration of the main question, whether the words "similar circumstances and conditions," in the act, do not necessarily refer solely to the circumstances and conditions under which the railway carries the traffic, and not to the infinite variety of circumstances and conditions under which the traffic is produced, or to the source of supply of such traffic, or the comparative conditions which may exist with reference to such traffic in lands other than our own.

Point I.

The Interstate Commerce Act in terms applies to traffic of foreign origin as well as to that of domestic origin, and includes, under its inhibitory and punitive clauses, all traffic going from a foreign port to any point in the United States, and does not give any right to any railway company to discriminate in favor of foreign products against home products, by giving preferential or discriminating rates in favor of the former as against the latter.

The Interstate Commerce Act in express terms, in its first section, provides as follows:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a continuous carriage or shipment from * * * any place in the United States * * * through a foreign country to any

other place in the United States, and also to the transportation, in like manner, of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, *or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or of an adjacent foreign country.*"

Therefore the provisions of the act, and all of them, apply in terms to all foreign merchandise shipped from the interior of a foreign country to a foreign port, and from such foreign port to any place in the United States, and carried to such place from a port of entry in the United States. Let us take, for instance, merchandise shipped from any part of England to New Orleans, a port of entry in the United States, and shipped thence to any place in the United States, to wit, San Francisco; there applies to this traffic, in the first place, that provision of section 1, by which every unreasonable charge is prohibited and declared to be illegal, and secondly, § 2—that every carrier subject to the provisions of this act (including one engaged in traffic from England via New Orleans, a port of entry in the United States, to San Francisco, a place in the United States, as provided in the first section of the act) shall not directly charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of such property, than he charges, demands or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and that the carrier shall not indirectly make any such discrimination either by rebates, drawbacks, or any other device.

I deliberately transpose the words of the act, because it seems that the respondent's claim is, that the second section of the act is not contravened

unless there is a special rate, rebate, drawback or other device forming an indirect preference, and that a direct and avowed discrimination is sanctioned by the second section of the act. The second section clearly means that no direct charge creating any preference shall be made, and no indirect charge shall be made resulting in the same thing, giving several instances of such indirect charges, and including in a general phrase "all other devices" which may produce such a result, any devices not mentioned. The third section, by its prohibition that it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, also prohibits the practices of the defendant.

The second and third sections of the act regulating interstate commerce, providing that, under similar circumstances and conditions, the traffic of railways shall go forward at the same rates without discrimination, preference or advantage between shippers, are rigid and ought not to be argued away or nullified by excuses of any kind on the part of the carrier, nor should such excuses be sanctioned by the courts.

The first section of the act, which prohibits unreasonable and unjust rates, allows necessarily, on the part of a court or commission, the exercise of a discretion in determining the reasonableness or justice of the toll.

The fourth section of the act also allows a discretion to the Commissioners, when reasons are presented showing why the Railroad Company should be permitted to disregard the long and short haul clause. The terms of the act necessarily take such

discretion away from the Railway Company, and without such permission the carrier cannot infringe its provisions. The Commission may take into consideration all the questions which are raised here as to relieving the Railway Company of the necessity of compliance with the long and short haul clause, but the carrier may not take those same questions into consideration himself. He is bound, in the absence of a permission from the Commission, to adhere rigidly to the rule laid down by the act.

When English decisions of cases anterior to the English statutes of 1880 and 1892, are cited, as rules of interpretation of the Interstate Commerce Law, the fact must be taken into consideration that until recent years (that is, since August, 1888), the English statute law has not been as rigid in its prohibitions of certain offenses by carriers, as the Interstate Commerce Law has been. I now cite for the purpose of comparison, the parallel provisions of the acts, English and American.

ENGLISH ACT.

Sec. 90, Railway Clauses Act. 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railways so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine *passing only*

over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor or against any particular company or person traveling upon or using the railway."

AMERICAN ACT.

Sec. 2. Act to Regulate Commerce. 1887.

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

ENGLISH ACTS.

Sec. 2. Railway and Canal Traffic Act. 1854.

Sec. 11. Railway and Canal Traffic Act. 1873.

"* * * and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

AMERICAN ACT.

Sec. 3. Act to Regulate Commerce.

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or

give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

There was no English provision forbidding the smaller freight charge for the longer haul, and all such cases, when they occurred, came up under the general provisions of the acts against undue preference or unjust discrimination.

The fourth section of our act, however, distinctly prohibits it, and gives the exception, and therefore in terms excludes the Court from the consideration of any other exception. This exception is created by assent of the Commission alone. That section provides as follows:

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

A Select Committee on Railway Rates, consisting of twenty-seven Members of Parliament, among whom were all the leading experts in Parliament upon questions of railways, such as, for instance, Sir Henry Tyler and Sir Edward Watkin, was appointed in February, 1888, in consequence of a very active agitation that had been made in England of grievances against railways, which grievances were a serious cause of complaint among traders and producers.

This committee sat for a period of eight months, and three huge volumes of testimony were taken, mainly upon one question: It was complained that grain and meat products were taken by steamships from America, and by railway from English ports of entry, on a through bill of lading, to interior stations in England (for instance, on a through bill of lading from New York or Boston, by way of Liverpool, to London) at a lower rate of railway carriage than the local producer could get the same products carried for the shorter distance merely between the English port of entry and the same interior stations in England (for instance, from Liverpool to London).

The committee united in a report in which, on page 9 of the 3d volume, they say:

"Farmers complain that imported agricultural products are given a bounty over home produce, by being carried at a lower rate; that foreign corn and meat are carried from Liverpool to London for less than English corn and meat; that American cattle are conveyed from Glasgow to London for less than Scotch cattle; that cattle landed at Newcastle are carried inland for less than cattle reared in Northumberland and Durham; that foreign fruit and hops are carried from Boulogne or Flushing to London for less than fruit and hops from Ashford or Sittingbourne. Wire manufacturers complain that Belgium wire and other goods are brought from Belgium to Birmingham for less than similar goods are charged from Birmingham to London. Makers of chemicals complain that coal which they use is made to pay higher rates than coal sent past their works to Liverpool for

exportation to their foreign rivals. Limerick complains that foreign bacon and provisions are carried from Liverpool to Limerick at much less rates than is charged for Limerick bacon over the same route to the same port. Bradford complains that the export trade from both Manchester and Bradford enjoys rates which are preferential as compared with those of the home consumption trade. In short, the complaint is frequently heard that railway companies prejudice home producers by low import and export rates.

Your committee think that many of these differential charges afford substantial grounds for complaint, but they do not consider it necessary to express an opinion as to how far these differential charges constitute undue preferences, because that is a point which the proper tribunal has full power to determine, and each case must be considered on its merits.

At the same time it must be admitted that when a farmer sees American meat carried at a lower rate than his own; or when a manufacturer in a manufacturing district has his profits in that market reduced by a competitor at a distance who is brought into the market by the lower rates given to him, it is not surprising that there should be complaints and that attempts should be made, and from time to time repeated, to fix some standard by which rates shall be determined. One form in which this proposal has been made is, that the rate ought to bear some fixed proportion to the cost of the service performed; or, in other words, that the companies ought not to be allowed to make a higher profit on one part of their traffic than on another."

Again, on page 5 the report says:

"Numerous complaints have also been made that foreign produce is carried at lower rates than home produce under *similar circumstances and conditions.*"

Now, here you have the precise terms of the American statute used in the report of this committee, in their proper sense, showing that in the committee's opinion the similar circumstances and conditions relate wholly to the ~~traffic~~ transit, and that so long as the traffic moves on the lines of

domestic railways under similar circumstances and conditions as to the conveyance, no dissimilarity either of circumstance or condition occurs because of the foreign competition of railway lines in America, Australia, or elsewhere, or of the competition of the steamship lines, which bring the goods to England.

These recommendations of the committee were followed by the statute known as the Railway and Canal Traffic Act of 1888 (51st and 52nd Victoria, Chapter 25), which among its provisions contained the following:

"Section 27. 1. Whenever it is shown that any railway company charges one trader or class of traders, or the traders in any district, lower tolls, rates or charges for the same or similar merchandise, or lower tolls, rates or charges for the same or similar services than they charge to other traders or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

2. In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction of the matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other consideration affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interest of the public the traffic in respect to which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: *provided that no railway company shall make, nor shall the Court or Commissioners sanction any difference in the tolls, rates or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.*

3. The Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchan-

dise carried over a less distance, than is made to any other persons for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway."

This put the English statutes with reference to foreign and home traffic precisely upon the basis of our American statute.

By the concluding paragraph of Subdivision 2 of Section 27 of the English act, the power is taken away from both the courts and the Commissioners to allow an exception in the case of foreign merchandise as against English goods to be made, because the Englishman would thus be subjected to an undue competition, which exception is, however, allowed to be made as to other traffic by sub. 3 of § 27 of the same act. Our act (Section 1) in making all the provisions which forbid inequality or discrimination or undue preference apply in terms to foreign goods, made the very same provision in 1887, only in different language, which was inserted in the English law by the second and third paragraphs of Section 27 of the Statute of 1888.

This Court has recognized, in the case of the Interstate Commerce Commission against the Baltimore and Ohio Railroad Company, 145 U. S., page 284, the distinction between the English cases as applied to the English statute and the American statute.

Justice Brown says:

"These traffic acts" (English Acts) "do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the 'long and short haul' clause of the act, or would be open to the charge of unjust discrimination."

The rule of interpretation herein contended for, namely, that under the fourth section of the act the Railway Company cannot judge in the first instance of the existence of the competition which

may be considered by the Commission, is reaffirmed in the case of

Behlmer v. *The Memphis & Charleston R. R. Co. & ors.*, decided June 20, 1894, by the Railway Commission. Vol. 6, of the Reports of I. C. C., page 257, Nos. 13–16, inclusive.

Point II.

The provisions of the second and third sections of the Interstate Commerce Act are rigid rules of action which may not be disobeyed by the carrier for any reasons of expediency or business considerations whatever. They are declarations of a public policy superior to any views of policy adopted by the railways, and if to be changed, change should not be permitted to be made by a disregard of the law, but by an amendment thereof.

(*a.*) The words "substantially similar circumstances and conditions," as used in the act, have reference, as judged by their context and meaning and their relation to other words used in the act, to the transportation service of the railway alone, and not to any other "circumstances or conditions" disconnected from the specific railway service rendered in the transportation of the traffic, the rates for which are complained of.

(*b.*) That even if it should be held that under Section 2 the "substantially similar circumstances and conditions" may leave open for the consideration of the railway officials "circumstances and conditions" disassociated from the traffic, Section 3 excludes the words "substantially similar circumstances and conditions,"

and all undue and unreasonable preferences or advantages are forbidden under that section of the act, irrespective of any dissimilar circumstances and conditions whatsoever.

(*c.*) The same rule which applies to Section two of the act, applies to Section four of the act, where the words "similar circumstances and conditions" again appear. In this section, these words relate to the traffic service only, and not to circumstances and conditions which are independent of the traffic service of the railway, and if such circumstances, independent of the traffic services, are to be considered at all, they are to be weighed by the Commissioners only, on the question of relieving the railway company, on its application, from the operation of that section of the act, and from the duty imposed by the section as to long and short hauls.

(*d*). That the considerations of expediency which the Interstate Commerce Commission must consider in suspending the operation of the fourth section of the act, either in particular cases or in classes of cases, are not open for consideration, and are not permitted to enter in the determination of railway charges under Section Four of the act, in the absence of any such permission.

I shall allow my associate to dispose of the questions of practice. In answer to the lengthy argument of the defendant's counsel on the merits, I assert that to describe it generally, they seem to have two excuses for the discrimination found in this case: First, that their compliance with the order of the Interstate Commerce Commission and with the law, would make the Railway Company lose the traffic; that, unless they are permitted to make the discrimination against the citizens of New Orleans and all American manufacturers by charging, say, for a case of American

cutlery a through rate of $1.07 per hundred pounds from Liverpool to San Francisco, including the ocean freight, as against $3.70 per hundred pounds from New Orleans to San Francisco, alone, or for a car load of carpets at $1.07 per cwt. from Liverpool to San Francisco including the ocean freight, against $2.88 from New Orleans to San Francisco alone, or for a case of books, at $1.07 per hundred pounds, from Liverpool to San Francisco, including ocean freight, as against $2.88 per hundred pounds, for books from New Orleans to San Francisco alone, they would not move the foreign traffic to San Francisco, via New Orleans; and, Secondly, that the act of the Texas and Pacific Railway Company in assisting in the carriage of goods from Liverpool to San Francisco at one-third the rate for which it carries the like goods under like circumstances and conditions from New Orleans to San Francisco, does not in itself exclude the American manufacturer or the local tradesman in New Orleans from competition with the English manufacturer in the San Francisco market, because, forsooth, if the railway from New Orleans were to go out of the business of such carriage, the same goods would in all probability be laid down at San Francisco at a similar low charge for transportation, by sailing ships from Liverpool around Cape Horn to San Francisco, or by sail or steam ships, from Liverpool or Southampton to Aspinwall and there transshipped by rail to Panama, and from Panama again by ship to San Francisco; that, therefore, the American manufacturer or producer is, in any event, out of the market. But if this reasoning is correct, every importer at New Orleans or even at the Alantic seacoast who purchases a quantity of articles from abroad, is placed at an undue disadvantage in attempting to sell it on the Pacific coast, by reason of competition of the Texas and Pacific Railroad and the competition of the ship lines and railways outside of the jurisdiction of United States legislation.

The answer to the first proposition that it is necessary, for the purpose of making a profit, that the railway company shall infringe and violate the law, is that this proposition is one that the Court instituted to enforce the law has no right to consider either as an excuse or palliation. All police laws and health laws could be set aside on the ground that their observance inures to the disadvantage or detriment of a part of the community, and even at times to entirely useful and proper classes of the community. The consideration that the observance of such a law would be a loss to the carrier is one which must address itself to the legislative branch of the country alone, as to whether there should or should not be an amendment to the law in that particular, so as to justify that which is otherwise illegal. The courts can give no consideration or countenance to such an excuse for the violation of the law.

1879

In 1879 I carried on for the State of New York, as counsel to the Hepburn Railway Committee, and as representing the Chamber of Commerce and Board of Trade, an investigation of railway abuses as they then existed in the State of New York. It was shown to that investigating committee, that in consequence of a railroad war, which was then being carried on, the rate of freight on flour went down to ten cents a hundred pounds from Minneapolis to New York, whilst the rate from Rochester, Niagara and Black Rock (milling centres) remained far in excess of that sum; that although the New York miller was as effectually put out of the business of milling and supplying the market of New York City as though the torch of an incendiary had burned down his mill, yet it was claimed there, as here, by the railway corporations of the State of New York, that the victim had no reason to complain of the New York railway companies in making such rates, because forbidding them, by New York statute, to make rates of that character would not benefit the New York miller, so long as the Pennsylvania Railroad Company or the Baltimore and Ohio Railroad

Company could, by their tariffs—and they were not subject to the jurisdiction of the State of New York—lay down at Jersey City, opposite New York, the flour at the ten-cent rate. The answer made by New York State was that that might be true, but that it had a right to protect its natural children. from being injured by its artificial children—the railway corporations chartered by the State—even if it could not protect them from being devoured by alien artificial children. The same answer holds good here. We can prevent, under the Interstate Commerce Act, railways that carry interstate traffic either from New Orleans to San Francisco or from New York to San Francisco, from an act of discrimination so gross and so great as manifestly to drive out of business all but the English competitors from the San Franscisco traffic, even if this act cannot wholly prevent the injury from being done to our citizens by other and alien corporations who do not, in consideration of bearing the burdens of our laws, receive also their benefits. It is not even manifestly true that they would have to go out of the business of carrying that class of merchandise set forth in the case on page 132 of Record, from New Orleans to San Francisco.

The Court will take notice of the fact that the only routes suggested by which the same traffic can go to San Francisco from England, is by sailing vessels around Cape Horn, involving a trip of between four and five months' from the ports of England, and another route involving two transshipments at least, if not three, from steamship to rail and from rail to steamship, via the Isthmus of Panama, —another extremely roundabout way of transportation.

The answer of the defendant, that it must do injustice to live, is very much the same as that of a French culprit in the last century who was charged with stealing, and replied, "I must live." He was met with the response from the French Judge that he did not see the necessity, and was ordered to execution. As to the second position taken by the

defendant, it is very much as though a person charged with highway robbery claimed as an excuse for his performance that he found the man on a dangerous road, which was infested with highwaymen, and that the victim has no reason to complain of the robbery by himself because he would inevitably have met the same fate at the hands of some one else possibly not so favorably inclined to the victim as he was.

Our answer to both of these propositions is the language of the statute, which forbids the doing of this injustice to the American producer, and permits of no excuse on the ground that the doing of the thing forbidden by the statute is profitable to the railway, or on the ground that the victim of the injustice would not ultimately be benefited by the observance of the law on the part of the railway company.

Even England, with all its free trade tendencies and practices, allowing, with reference to all raw material and manufactured goods (with the exception of about twelve articles, and those not produced in England) almost entire and absolute freedom of competition by the foreigner, has expressly said to its railways by its statute of 1888: "You shall not put the foreigner, by your railway rates, in a better position than you do the home producer and the home trader." And there, the difficulty of the home producer and the home trader is vastly more intensified by the cheap rates from abroad and by the competition of ocean-going vessels, because England is a small island, indented on all sides by harbors on which great cities are placed, and navigable rivers and canals which reach the leading cities. The English railway is placed under a water competition from all the world vastly greater than is encountered by any American railway, but even in that country no such excuse as loss of traffic or the inevitable competition which, even if they surrender the traffic, the English producer meets from foreign railway rates and ship lines, was permitted to prevail, and the Parliament-

ary Commission of 1888, recommended, in express terms, the stoppage of the practice by the railway, and was immediately followed by the English Parliament which, in the express provisions of Section 27 of the Statute of 1888, forbade in the future any discrimination between foreign products and English products to the detriment of the English producer and trader.

If the company may consider the difference as to the origin of the traffic, as a reason for making a discrimination between like traffic going over the same line from New Orleans to San Francisco under precisely similar circumstances and conditions of traffic movement as to the railway, why may they not consider then, as a rightful cause of discrimination between two manufacturers at New Orleans, the difference between the advantages of the one as against the disadvantages of the other in manufacturing the same article to be transported to the San Francisco market, its ~~part~~ point of consumption?

A has secured for his factory natural advantages of situation by reason perhaps of water power. He has also large capital, intelligence, industry and shrewdness. *B* has an unfavorable position, no natural advantages, a badly planned factory, inadequate capital and antiquated methods. The market of both for the consumption of their product is San Francisco. Their factories are both at New Orleans. May the railway company, because the circumstances of production are different, carry the goods of *B* at half the price at which the goods of *A* are carried? Clearly not.

If similar conditions and circumstances are not confined to similar conditions and circumstances under which the traffic moves, that is to say, in train loads instead of car loads, car loads instead of single packages, classifications and rates of speed, &c., conditions and circumstances affecting the railway and not the origin of the traffic, there is no limitation to the discriminations and preferences which may be exercised by the railway company, and the

second, third and fourth sections of the Interstate Commerce Act become idle words. "Similar circumstances and conditions" must mean circumstances of traffic arrangements and conditions of expense and cost to the railway to move the traffic, whether it be quick freight or slow freight; whether it moves in train loads or car loads. If this designation be not confined to the traffic itself, but it is left open to the railways to consider and determine whence the freight comes, and how it is produced, and to charge different rates upon two cases of books moving from New Orleans to San Francisco carried under like conditions and circumstances, or two car loads of carpets moving between the same points, and drawn by the same locomotive, then all restrictions of the act requiring just and equal treatment of shippers become entirely nugatory.

All of which is respectfully submitted.

December 10th, 1894.

SIMON STERNE, John D. Kernan
Of Counsel for the
Interstate Commerce Commission.

631

Office Supreme Court, U. S.
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Clerk

IN THE

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION,
Appellee.

Argument for the Commission.

LAWRENCE MAXWELL, JR.,
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1894.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Appellant.

against

THE INTERSTATE COMMERCE COMMISSION,

Appellee,

Points for the Commission.

This is an appeal from a decision of the Circuit Court of Appeals of the Southern District of New York, affirming a decision made by Judge Wallace under Sections 15 and 16 of the Interstate Commerce Act, granting an injunction to enforce an order of the Commission, directing the defendant to cease and desist from carrying import traffic from New Orleans upon through bills of lading issued in foreign ports to interior American points, at any lower or other rates than the inland domestic tariff rate for the carriage of other like kind of traffic in the elements of bulk, weight, value and expense of carriage.

Transcript Record, pp. 206, &c.; 263.

References are to marginal pages.

The defendant was not an original party before the Commission, but upon its being alleged by the

Pennsylvania Railroad that its *competitors* in the transportation of imported traffic from the seaboard to the interior were engaged in this rate cutting business, the Commission ordered that all such competitors be brought in.

Answer Penn. R. R., p. 31.
Orders Commissions, p. 34.

The St. Louis, Iron Mountain and So. Railroad in its answer alleged that defendant had an interest in the question, &c., and then by order of the Commission defendant was made a party to the proceeding, and appeared and answered.

Pages 70-73; 116.

First.

Not only is the petition sufficient, but it is supplemented by defendant's admissions and allegations of all material facts.

In its statement filed with the Commission, p. 161, the defendant says:

"Both before and since March 23d, 1889, *it* has "carried imported traffic at lower rates than it has "contemporaneously charged for like traffic origi- "nating in the United States, and it does so because "the through shipment from a foreign country to "the interior of the United States differs in circum- "stances and conditions from shipments originat- "ing at the American seaboard bound for the "same interior points, and it believes that it has a "legal right to accept for its share of the through "rate a lower sum than it receives for domestic "shipment to the same destination from the point "at which the imported traffic enters the country."

This statement and admitted table 36 cover the facts fully, out of which the law question in the case arises.

In the petition to the Circuit Court this statement and its admission are made a part thereof.

Petition, p. 12.

In the answer to the petition the defendant states at paragraph VI, p. 256;

" Respondent admits that *it* now charges, de-
" mands, collects and receives, and has, since the
" date of the alleged order of said Commission of
" Jan. 29, 1891, charged, demanded, collected and
" received rates for the transportation of commodi-
" ties from Liverpool and London, England, *via*
" New Orleans and the Texas and Pacific Railway
" and the Southern Pacific Railway to San Fran-
" cisco, California, and also from New Orleans, *via*
" same route to the same destination, substantially
" as stated in Exhibit 36 to the bill of complaint."

This admission that *it* alone *charges*, demands, collects and receives, &c., the lower rates, set out in table 36, removes from discussion the point urged as to the non-joinder of the Southern Pacific.

Under the act it is unlawful to *charge*, &c., a forbidden rate regardless of how the wrong-doer divides it with some other railroad.

The further admission is to be remembered which the law implies from a *failure to deny* any *fact* charged in the petition. The petition is not defective, if it be sufficient in such a petition to allege all the proceedings before the Commission which resulted in an order made and served by it upon the defendant, and then to charge violations of the order. Table 36 is not to be considered as restricting the broader allegations of violation, but simply as added thereto by way of example or partial specification. Greater specification might

perhaps have been required in the court below, but failure to then demand it forbids criticism of the petition here in this respect.

Under the language of Secs. 14 and 16 of the act the findings of the Commission are *prima facie* evidence in all judicial proceedings. In a conflict between them and a simple verified answer they would, of course, prevail as to a disputed fact.

Judge Wallace held the main question free from doubt, and simply stated his conclusion. The balance of his opinion is devoted to the plea that out of its import traffic rate the defendant gets some revenue which it would lose were it not for the cut rate. He holds that this fact does not make the discrimination just, nor the preference due and reasonable, or permissible under the act.

In order to affirm the decree the Circuit Court does not find it necessary to go further than to hold that the great disparity in the rates of itself is sufficient to sustain the decision below; that, even conceding the defendant's position, no sufficient reason is shown to justify the discrimination admitted and the preference shown to import over domestic traffic; that on their face the higher rates are relatively unjust and unreasonable.

Stripped of verbiage and presented simply, the question is whether *imported* traffic can be charged lower rates for like service than *domestic* traffic of like weight, &c., without violation of either, or all, of the sections of the Interstate Commerce Act as to *unjust discrimination*, *undue preference*, and the *long and short* haul clause.

Thus the regular published inland tariff rate of the defendant on "books" from New Orleans to San Francisco is $2.88 per 100 lbs.

Page 212.

Its entire through rate on "books" from Liverpool to San Francisco is $1.07 per 100 lbs.

Division of through rate:

Steamship,	.27	
Inland	.80	$1.07

See Finding Commission, pp. 176-7-8.

The facts found by the Commission as to the existence of competitive conditions in foreign ports between steamship lines running to different American ports concede the contention of the defendant in that regard, as stated in the answer and quoted above. Those facts are held by the Commission not to constitute *such dissimilar circumstances and conditions* as to justify any difference between rates from the seaboard to the interior. The holding is, that it is immaterial whether the article be *import* traffic carried under a through bill, or *domestic* traffic carried on a domestic bill; each must be carried at the same regular and lawful posted tariff rates; also, that even if these circumstances and conditions can be *legitimately* considered and be so *dissimilar*, &c., as to justify the discrimination under Sec. 2, still an undue preference is given under Sec. 3, which forbids such a preference to be given to any "particular description of traffic," *regardless of differing circumstances and conditions;* also, that Sec. 4 of the act is violated. In short, that the transportation regulated by the act does not extend beyond the seaboard in the U. S., and in adjacent foreign countries, and that we may not regard as *legitimate* any circumstances and conditions which are found beyond such seaboard for the purpose of justifying a difference in domestic rates between import and domestic traffic of like weight, &c., for like service. If the Commission had the power to make the order, and its construction of the act is right, then the order is *lawful;* otherwise it is not. The question is one of law simply, upon the pleadings and the findings made by the Commission.

The cost and character of the service rendered in transporting import and domestic traffic are the same.

It is admitted and found by the Commission "that if all the competitive difficulties in foreign "ports were eliminated, there would be no reason "why the inland tariff should not be a rate for all "the business, whether carried under a through "bill or a local bill," p. 184, 187.

Also, that "there is no appreciable difference in "the circumstances and conditions which affect "the expense to the road at New Orleans in hand-"ling import goods and in handling local goods," p. 184.

Also, that "the proportion the Texas and Pacific "receives of the through rate is remunerative. "The preponderance of its empty cars go north "during eight months of the year, and if some-"thing can be obtained to load, it is that much "found, and anything is regarded as remunerative "that can be obtained to put in its cars to pay "mileage," p. 178.

That is, it would be remunerative in the sense in which the word is here used for the Penn. R. R. to fill an otherwise empty seat from Washington to New York for ten cents. It would not, however, pay the cost of the service, and would be an unjust discrimination against those paying full fare.

Also, that there is not, and cannot be, any fixed relation between the inland domestic, and the inland proportion of these through rates. While domestic rates are stable and posted and changed on notice according to the requirements of the act, through rates do, and must, change daily, and even hourly, p. 177.

"Many American manufacturers and dealers in "almost every line of manufacturing and business "are the competitors of foreign manufacturers for "supplying the wants of interior American con-"sumers, and under domestic bills of lading seek

" to require from respondents (defendant) like ser-
" vice as their foreign competitors in order to place
" their manufactures with interior consumers."

See Finding, p. 176.

Export and import ports are fixtures--they are natural centers of exchange with foreign countries. The conditions of all markets are there most quickly felt and responded to, and it is from those places that advantage can most quickly be taken of for ein market demand and competition in ocean carrying. While the ports, for these reasons cannot demand that their dealings with foreign countries *shall be favored by interior rates, so as to prevent through billing between interior and foreign markets direct*, yet, they only urge a sound public policy when they insist that railroads shall favor neither through billing nor seaboard consignments in their rates, but that the inland tariff, founded upon competitive conditions, to and at the seaboard, shall be the basis of all rates.

The New York Produce Exchange *v.*
Trunk Lines, 2 I. C. R. P., 553.

New Orleans has the longer sea route to Europe as compared with Boston, New York, Baltimore, Philadelphia and Montreal. Its main competition for the export and import trade is with these ports, and the cut in inland rates at that port is really to equalize its natural disadvantages. There is some competition at Liverpool for San Francisco business with railroads and vessels by the Panama route, and, to a slight extent, with sailing vessels carrying cheap heavy goods around Cape Horn.

Practically, the railroads at New Orleans are using their share of through rates as a pry to lift import business from other more favored ports, *i. e.*, from where it naturally would go under normal conditions to a port disadvantageously situated.

Other facts are sufficiently stated in the opinion below.

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Other facts are sufficiently stated in the opinion below.

Second.

The Interstate Commerce Act forbids any difference in rates, &c., between import and domestic merchandise for like service.

See Opinion Commission.

1. In the first section of the act we read, "*that the provisions of the act shall apply*; . . . also to the *transportation in like manner of property . . . shipped from a foreign country to any place in the United States, and carried to such place from a port of entry, either in the United States or an adjacent foreign country.*" The omission to repeat the words "*any common carrier or carriers engaged*," points to a limitation of this provision as compared with the previous one, which broadly covers all engaged in domestic transportation. This limitation reminds us that "*carriers engaged*" in transporting import traffic, under through bills, were not to be regulated throughout the transportation, but that the only object of regulation was that part of such *transportation* lying between a port of entry in the United States, or Canada and any interior destination.

The words "shipped," &c., shows that some regulation as to property imported was intended, and the following words "*and carried*," *&c.*, clearly exclude regulation, unless "*in like manner*," to wit, by rail, or rail and water, the property is carried to interior points from the seaboard.

These words "and carried," &c., limit the regulation of the act to a case of transportation where there is inland carriage, and with clear inference refer to such inland carriage as the object aimed at.

See Opinion Commission, p. 191.

If the Commission is right in this position, it certainly follows that Congress did not intend that its obvious attempt to include the inland transportation of export and import traffic under the regulation of the act should be frustrated by the device of a union between our railroads and unregulated ocean carriers subject to foreign competitive conditions. For Congress to carefully exclude regulation of ocean carriers and then to permit the competitive conditions surrounding them abroad to control our inland rates upon imports and exports would be a strange incongruity.

2. Starting with the familiar proposition that the act is to be construed so that all of its provisions may be effective as to every species of traffic carried on over our railways, we are forced to the conclusion that it clearly, by implication, forbids a discrimination being made by railways between import and domestic traffic, because if such discrimination be permitted, and the theory of the defendant in reference to import rates be approved, it leads us, as to import traffic, to a virtual nullification of the entire spirit of the act and of its most important provisions. For example, all provisions as to the publishing of rates and as to notice of advances, etc., are entirely nullified

See Opinion of Commission, p. 193.

If the defendant is right in asserting that it is justified, because of steamer competition at different ports, in taking what it can get out of the through rate made by the steamer, regardless of the provisions of the act, then it follows that there can be no such thing, in through rates, under the act as unjust discrimination against domestic shippers for like service. The rates are not, by law, to be compared; they are not *in pari passu;* the conditions at Liverpool (where rates vary *daily*) make the through importer's rate; those at New Orleans or

New York the domestic merchant's higher rate; they cannot have, and must not be expected to have, any relation to each other; the law covers the one and not the other, &c.

Is it possible that Congress intended that this import traffic should be thus removed from the regulation of the act? We submit not. The act to regulate commerce, in its spirit and provisions, clearly, by implication, forbids a difference in rates between foreign and domestic traffic under any circumstances whatever.

Again, every section of the act subsequent to the first is made applicable only "to any common carrier subject to the provisions of this act." Steamship lines touching at American ports are not such common carriers subject to the provisions of this act, as will be seen by reference to the first section; hence it follows that none of the provisions of the act are applicable to such steamship lines, and that, if the making of inland railroad rates be placed in their hands, as is practiced, nothing that such steamship lines might do in reference to such rates would be covered by any of the provisions of the act. Such a partnership as is involved in the making of through rates, as practiced by the defendant, wherein there is a divorce between inland tariff domestic rates, and the inland proportion of the through rate, and wherein the inland proportion of the through rate is substantially determined by the steamship partner, whose acts are not reached or controlled by the provisions of the act, was certainly never contemplated by Congress. Such a construction nullifies the act. Congress never intended that any railroad rate should be fixed and controlled by steamship carriers outside of the law, or by the foreign circumstances and conditions surrounding such carriers, which are so far away, so numerous and so complicated as to elude the grasp or analysis of any mind. Neither did Congress intend that railroads should enter into partnership with steamship lines on such terms as to permit

that their inland tariff rate should be used by their steamship connections to overcome competitive conditions at foreign ports, to equalize ocean differences in length of voyage, quality of vessels, &c., nor to overcome port disadvantages existing on this side of the water. Rather was it the intention that the steamers and ports should be left to fight their own battles and that the railroads should devote themselves to carrying from their terminal ports such traffic as should naturally come there.

There is nothing in the act to prohibit through billing, which is right and progressive, but the scope and spirit of the act forbids a railroad to become a party thereto under any other arrangement than that the through rate shall be made up by adding the inland tariff rate to that of the steamers, as directed by the Commission in the order of March 23, 1889.

Third.

The course of legislation in England upon this question sustains the position of the Commission.

1. Section 2 of The Railway and Canal Traffic Act of 1854 is, in substance, sections 3 and 4 of our act. There is nothing else in the English act controlling the construction of the 2d section as to this export and import question.

Section 2, standing alone, was held not to apply to transit by sea, nor to a contract made abroad to carry from a foreign town to a town in England, though partly over the Company's line in England.

Napier *v.* Glascow and N. W. Ry., 1 N. and Mac., 292.

The Napier decision seems to have led to the 16th section of The Regulation of Railways Act of 1868, which extends the provision of the Railway and Canal Traffic Act of 1854 to the steam vessels of, or worked by, a railway company, and running between town and ports. (of the Kingdom?)

In Sec. 12 of The Regulation of Railways Act of 1871, and Sec. 11 of The Regulation of Railways Act of 1873, there are recognitions of the right of railway and canal companies to become parties to arrangements with steam vessels for through booking between towns and ports.

Doolan *v.* Mid. Ry. Co., 2 App. cases, 792.

Notwithstanding the decision in the "Denaby" case in 1885 (11 App.Cases, 97), the vicious practice, against which we here contend, had grown up under these acts under claim of authority. This led to sub. 2 of Section 27 in the Railway and Canal Traffic Act of 1888, which expressly provides: "That no railway company "shall make, nor shall the Court or Commission "sustain, any difference in the tolls, rates or charges "made for, or any difference made in the treat- "ment of home and foreign merchandise in respect "of the same or similar services."

This act would have been even more superfluous had the English acts, from 1854 to 1888, been of the structure and contained the many provisions of the Inter-State Commerce Act, to which the Commission alludes in its decision as dead letters under defendant's construction. A construction which nullifies an act of Congress as to a subject-matter, designed to be covered, cannot be sustained.

Fourth Point.

The points used before the Commission in the export and import rate cases are submitted.

Besides referring to the authorities therein fully cited, we call attention to the following rules:

1. The fact that a lower rate is charged is evidence that the higher rate is unreasonable.

   Gt. W. R'way Co. *v.* Sutton, L. R., 4 H. L., 237.

2. Articles classified alike are presumptively entitled to equal rates; and if a difference is made by a carrier, it assumes the burden of sustaining it by satisfactory evidence.

   See Opinion, p. 201 of Petition and Citations.

   Railroads must treat ports competing for ocean business alike.

   Ayr Har. Trustees *v.* R'ys, 4 B. & Mac., 90.

3. When goods are carried for different customers "over the same portion of the line of railway," the fact that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade, to open up new markets, and so to increase the tonnage carried, does not constitute a difference in the circumstances so as to justify inequality of rates.

   Thus coal destined to be exported cannot be charged a lower rate than coal designed for domestic use.

   Denaby M. C. Co. *v.* M. S. and L. R'way Co., 11 App. Cases, 97, House of Lords.

4. It is not a circumstance justifying a lower charge that the persons charged less can go by another route, and probably will do so if charged the higher rate.

Neither is it a difference of circumstances that those whom the railway charge less are seeking to develop a new trade.

Id., p. 120.
Eveshed's Case, 3 App. Cases, 1029.

5. An arrangement with connecting carriers, which is satisfactory and beneficial to the road, is not one which the Texas and Pacific Railroad can make, if contrary to its charter provisions or to the law.

Mo. P. R'y Co. *v.* T. & P. R'y Co., 30 Fed. R., 2.

Section 15 of the charter of the Texas and Pacific, which forbids discriminations as regards charges for freight and passengers in any matter, if to protect local shippers as well as connecting lines.

Id., p. 107.

6. Railoads cannot discriminate in rates between local and other freights, because the latter are destined to ports beyond the terminus.

"If they may use their exclusive powers over their road so as to force into their own hands all external carrying trade, and do this at the expense of a shipper or a class of shippers, it is quite possible for them to exclude one domestic product from all foreign markets."

Twells *v.* R. Co., 3 American L. R. N. S., pp. 728–732.
Schofield *v.* R. Co., 43 Ohio St., 571.
The State *v.* R'y Co., 47 Ohio Stat., 130.
See also cases cited in the courts below.

Fifth.

The long and short haul clause.

This provision of the act is flagrantly violated by defendant when it charges, or participates in charging, $1.07 from Liverpool to San Francisco, while charging domestic traffic of like kind $2.88 for the shorter service from New Orleans to San Francisco. The defense is the same as under the discrimination clause, and is to be tested by the same rules. If, as we argue, the competition at New Orleans with all American and Canadian rail lines reaching San Francisco is the only circumstance, &c., which can *legitimately* be considered by defendant in making rates, then it is violating this clause without justification. To sustain the defendant the Court must hold that by uniting with a steamship line to constitute the long haul the competitive conditions surrounding the steamship line at its foreign port can legitimately, under the law, be used by the defendant as a justification for charging less than its domestic rate as its share of the through import rate.

No one questions but that the defendant can and does find many dissimilar circumstances and conditions which justify its departure from the rule of the long and short haul clause in framing its tariff *from* New Orleans northward and westward. The question is, *after* all such dissimilar circumstances, &c., have been exhausted in framing its domestic tariff, can it then appeal to those ex-territorial circumstances, &c., which surround its steamship allies as a justification for a further and exceptional departure from the long and short haul clause, so as to permit it to take less than its domestic rate as its share of the import rate. The fact as found must be noted, that if the competitive difficulties at foreign ports are eliminated, there is no reason known, or alleged in defense by

defendant here, why the domestic inland tariff should not be the rate for all business, whether carried under a through or a local bill.

See Report Com., p. 184.

Sixth Point.

The defendant is not authorized to nullify our tariff laws as it does by this practice.

Courts will take notice of such public statutes and of their design and object, and will not willingly construe one public statute so as to thereby nullify the intent and design of another. To say that railroads may carry imports for foreigners at lower rates for like service than for citizens is, in effect, to permit railroads to nullify the protective features of the tariff act to the extent of the difference. Congress, of course, can do this if it chooses, but our contention is, that in the absence of a clear design to that end to be found in the Interstate Commerce Act, the courts will hesitate to so construe the act, as to nullify the clear intent and design of our tariff laws. From the tariff laws we simply argue against there being an intent in Congress to have the defendant's construction of the Interstate Act adopted.

Seventh.

Action of trunk lines.

It is a circumstance worthy of note that all the principal trunk lines of the country accepted

this decision of the Commission, except those running from New Orleans and San Francisco. Their action does not make our construction of the act right, but it is evidence of the practical propriety of the Commission's position on the question, and that those most interested in the decision concede its justice.

Pp. 176-204.

Eighth.

This decision of the Commission is in harmony with all of its decisions in anywise bearing upon the question.

Detroit B. of T. *v.* Grand Trunk, 2 I. C. R., 315.
Reul *v.* Chi. and N. W., 2 I. C. R., 540.
Rice *v.* A., T. and C., 3 I. C. R., 265.
Martin *v.* C., B. and Q., 2 I. C. R., 25.
Crewes *v.* R. and D., 1 I. C. R., 401.

Those cases may be illustrated as follows:

Grain rate Dakota to N. Y. *via* Detroit..... 25 cts.
" " Detroit, say..... 20 "
Detroit in above case urged that it ought to have the mileage proportion of the through rate, and that would be..... 15 "

The Commission decided against the claim because——

1. The rate to Detroit was within the through rate as a unit or entirety, and that satisfies the long and short haul clause; that clause does not require that the short haul rate shall be a mileage, or *pro rata* proportion of the long haul rate.

2. There is no unjust discrimination against Detroit, because the *local* to Detroit is not *in pari passu* with the *through* to New York—the conditions are dissimilar—the one being based upon competition between Dakota and Detroit, the other upon that between Dakota and New York.

These principles are well settled and are good law, but they have no bearing here.

In the cases cited all the conditions considered were *localized* within the United States, or an adjacent foreign country, as we insist those *legitimately* to be considered must be.

The defendant can use all the latitude allowed by these decisions in framing its tariff between New Orleans and San Francisco. It can charge as much to El Paso as to San Francisco, and yet be within the long and short haul clause. It can refuse to El Paso the San Francisco rate, or a *pro rata* thereof, as in the Lynchburg case, and still respect the discrimination and preference clauses. That is not this contention at all.

The question before us is, can it charge a man at El Paso its regular rate on books shipped from New Orleans, that rate being based on all the latitude allowed by the law and by these decisions, and at the same time charge his competitor in El Paso buying his books in Liverpool a much lower rate for like service between New Orleans and El Paso, because of competition between steamer lines plying between Liverpool and different American ports? We concede that the competitive conditions exist at Liverpool, and that they create dissimilarity between the two cases, *provided* that those competitive conditions at Liverpool can *legitimately* be considered. Our whole contention is simply that the law forbids their consideration, and hence they cannot be permitted to sustain the position of the defendant. The Commission has not stultified itself at all. It simply holds that all the circumstances, &c., to be considered in framing tariff, &c., are those *within* the

United States and adjacent foreign countries; that the seaboard is the terminus of American lines, and that they may not look beyond its boundaries for competitive conditions operating upon foreign transportation agencies to justify discrimination between our *import* and *domestic* rates.

If the Detroit case was like this case these would be the facts:

Grain rate, 100 lbs Detroit to Liverpool,
via N. Y.,..... $1 07
R. R., 80 cts.
S. S., 27 cts.
" " to N. Y..... $2 88

Ninth.

A decision upon the main question is urgent and necessary.

The broad question as to whether inland rates must be the same for both import and domestic traffic for like service is presented in this case. That is the question heard and decided by the Commission after long and patient consideration. The Commission had before it the trunk lines from all American and Canadian ports. It exhaustively considered the same question in the export rate case brought by the New York Produce Exchange. While this petition presents the validity of the order of the Commission as to the defendant alone, the order was based upon a full hearing and consideration of all that can be presented upon the question by American and Canadian railroads. It is of great importance that it should be decided. At the time of the decision there was general acquiescence in it by the principal trunk lines of the country, as shown by the record. The persistent violation of the order by a few lines, including the defendant,

has produced demoralization in these rates. It is notorious that vast quantities of imported tin plate are now being carried from abroad to interior American points at a fraction of the rate charged to American producers for like service by our railroads.

It has taken years to bring the question before this Court. To have the case affirmed simply upon the ground taken by the Circuit Court of Appeals will permit chaos to continue in these import rates during a long future period with great injury to railroads, shippers and manufacturers. If the Commission is right on the main question the decision should stand on that ground.

If the Commission is in error on the main question, then an order of affirmance should be had for the other reasons presented by the Circuit Court of Appeals.

Tenth.

An affirmance under the position taken by the Circuit Court of Appeals is, in any event, imperative.

Rates varying all the way from 70 cents to $3.70 per 100 pounds for like service cannot be defended in the absence of either allegation or proof as to their being either reasonable or relatively reasonable (see table, 36 p 176). This is especially true in view of the fact that there is no difference in their cost, expense or acceptional character of the service.

The defendant, in its answer, does not justify either its domestic or import rates. It simply leaves us to assume that its domestic rates are reasonable, and then defends its much lower import

rate for like service upon the ground that *it will lose the business unless it charges the rates of table 36.*

Answer, p. 256.

See Opinion Wallace, *J.*, below.

An affirmance will not interfere with perfect freedom on the part of defendant to fix inland rates as it pleases; it will simply forbid discrimination between rates for import and domestic traffic for like service.

Under no authority, either in England or in this country, can a road discriminate in rates for like service, simply because it will lose bnsiness unless it does so. This is no legitimate ground for a preference or discrimination.

Browne's Railway Practice, chap. 2 and cases cited.

Such as Nutshell's Case, 2 N. & Mac., 39.

Thomson's Case, 2 N. & Mac., 115.

Ransom's Case, 1 N. & M., 63.

Hayes *v.* Penn. R. R., 12 Fed. Rep., 309.

Meuses *v.* Penn. Co., 27 Fed. Rep., 529.

C. & A. R. R. Co. *v.* The People, 67 Ill., 11.

As stated by the Circuit Court of Appeals, the defendant is in no wise aided in this aspect of the case, even if we concede all it claims as to foreign competitive conditions. It certainly cannot carry discrimination and preference to an unlimited extent without giving some other reason than *alternative loss of business.*

The Court adopts the well-settled rule, that the burden is upon the carrier of sustaining, by satisfactory evidence, a difference in rates for articles classified alike.

Eleventh.

There is no defect of parties in that the Southern Pacific is not a party to this proceeding.

See Opinion below, p. 298.

This position is based upon ignoring that the petition, *charges*, and the answers of the defendant, *admit*, that defendant *alone* has violated the order by charging and accepting *a less* rate upon import traffic than it charges upon domestic traffic for like service.

But suppose that the petition and answers are narrowly construed as simply charging and admitting that the defendant *unites* with another in making a *through* rate from New Orleans to San Francisco, which is less than the rate which they unite in making for domestic traffic for like service. What of it? Is it not illegal for two to unite in an act forbidden by law, regardless of how they divide the results of their villany?

Must all of a gang of wrongdoers or conspirators be brought into court and tried together before one can be punished? What we seek to stop is by the act declared to be illegal as to every one engaged in it. Can one tort-feasor insist that his trial and punishment must be postponed until his co-tort-feasor in a joint act of legal violation is made a co-defendant, and their contractual relations as to the crime adjusted? That would be a fine way to oust the court of all the jurisdiction conferred by the act over a tort-feasor within its jurisdiction. Every one participating in what the law declares to be illegal and a misdemeanor is punishable separately. This is too well settled to be argued about. We are not trying defendant for its crime, but we are seeking to restrain it from committing acts declared to be illegal, and it would seem to follow from analogy that the court can proceed to restrain each tort-feasor separately.

If the joint rate made by defendant and others is a violation of the law, no contract between them can justify it or have any bearing upon the question.

Again, if defendant is right we must bring in the Steamship Company and perhaps some European railroads. The Commission never, as a matter of prudence, decides these questions without bringing in all roads interested in the question. It is not, however, a matter of right or necessity before the Commission, and what is done in that respect before that body has no bearing whatever upon the question of necessary parties in a court of law.

If the Southern Pacific is a *necessary* party to a proceeding to compel the defendant to stop violating the law as to rates made jointly between them, then all the roads that were before the Commission are necessary. They are all interested in the question and will be all affected by the decision, &c., &c.

The Southern Pacific is no more concerned in this case than are all the trunk lines that are engaged in the competition of carrying imports from the seaboard to the interior. All people holding promissory notes are not necessary parties to a suit upon one of the notes, although all may be bound to accept the law as therein laid down.

Twelfth.

The Court below had jurisdiction.

1. The *principal* office of the defendant, under Sec. 14 of the Interstate Commerce Act, is 195 Broadway, N. Y. City.

   Under the charter it can have its *principal* office in any place. New York City was the place provided as the place for incorporation, &c.

Its directors are to determine the place, &c.

16 U. S. St. at Large, p. 574, &c.
17 " " " " 59.
Beveredge *v.* N. Y. E. R. Co., 112 N. Y., 22; opinion.

2. The Statutes of Texas do not and could not affect this right.

See Resolution Board in moving papers so claiming (p. 219).

Prior to 1889 the Statutes of Texas required a railroad doing business in the State to have and maintain a *public* office in the State where transfer of stock could be made.

Sayles Texas Civ. St., Sec. 4115, &c.

Neither the agreement discussed in 136 U. S., 393, nor the decision touch the question here. The contention there was as to where the *Texas* offices should be, whether at Marshall or Dallas. The right of the corporation to have and keep its *principal* office wherever it choose, in or out of Texas, was not involved. At that time, as we see in the case, the office of the president was at Philadelphia, Penn.

The Texas State Act of March 27, 1889 (Chap. 106), required a railroad to keep and maintain its *general* offices, &c., within the State, on its line, and to have and keep certain officers there, to wit, President or Vice-President, &c., or some one to perform the duties thereof.

This clearly refers to *Executive* officers of different operating departments. The action of the road clearly shows this to have been its understanding, for under the resolution nothing was done, or changed, except to make the

general manager, Grant, 3d vice-president; the other departments were simply continued as theretofore.

Affidavit of J. D. Kernan, p. 240, &c.

Offices in plural confirm us. A road may have any number of *general offices*—ticket offices, transfer offices. It can have but *one principal office.*

West Texas Co. *v.* Schen, 19 N. Y., 408.

Its *general offices* and its principal office may be entirely distinct, either because of *Statute*, or where its charter does not control, as in this case, because of facts showing under well settled principles that the *general offices* and its *principal office* are to be regarded and treated as distinct.

The *general offices* in the aggregate are no more its *principal* office necessarily than is either one of them.

The history of its action since 1871 shows that it has always recognized and maintained the very difference we urge between its general or executive *offices* (plural) and its *principal* office (singular).

Its general or executive offices have always been in Texas.

The principal or, as it is sometimes called by it in that sense, *general office* (singular) has been in New York most of the time; in Philadelphia, Pa., for a year or two, when the president lived there; in St. Louis for three years, when its first, second, and third vice-presidents lived there.

3. This company being at liberty to have its principal office where it chose, we insist that its choice since Mr. Gould became president is No. 195 Broadway, N. Y. City.

(1.) Its stockholders there meet and elect directors; all reports to stockholders are there prepared, printed, dated and issued.

(2.) Ten of its fifteen directors habitually reside in New York City; they habitually meet and do their business as such at 195 Broadway, where the minutes of their proceedings are kept.

(3.) The Executive Committee of five all reside in New York, and habitually meet and do their business as such at the New York office where the minutes of their proceedings are kept.

(4.) The President, First Vice-President, and Secretary and Treasurer reside and have their offices in New York City, and habitually perform their duties as such at the New York office.

(5.) The monthly and weekly reports of operations, being the condensation of the business, are made to the New York office, *i. e.*, the results of the details of all bookkeeping at the Texas general offices, and the books showing such results are kept in New York, and therefrom the annual reports to stockholders are prepared and issued.

(6.) The certificates of stock are all issued at and from the New York office. They have to be signed by the president and secretary.

16 U. S. St. at Large, p. 577, Sec. 14.

(7.) The company has permitted and does permit Poor's Manual to publicly announce its *executive offices* to be at Dallas, Texas, its

general office (singular), as *195 Broadway, New York.*

(8.) In its reports to stockholders, it virtually concedes the fact to be as we claim, if it be borne in mind that its officers perfectly understand the distinction we have pointed out, thus:

General offices, Dallas, Texas;
New York office, 195 Broadway, N. Y.,

without qualification or restriction.

These facts bring it within the best definition of a *princical* office of a corporation to be found, to wit: "The home of a corporation must be taken to be that place which "is occupied by it as such, where their profits "come home to them, whence orders emanate, and where the chief officers of the "company are to be found."

In other words, where their *principal* office is located.

1st Wood's Railway Law, Sec. 14, quoting from Wilde, *B.*, in Adams *v.* G. W. R. Co., 6 H. & N., 404.

Thirteenth.

There is nothing in the criticism of that portion of the opinion of Judge Wallace which states that he misconceived facts, &c.

P. 263.

Throughout the opinion the Court clearly and vigorously considered the simple question of the propriety of a discrimination between rates upon

import traffic passing through New Orleans upon bills issued abroad, and rates upon *domestic* traffic from New Orleans under the domestic inland traffic. Whether the domestic traffic originated in New Orleans, or in New York, Chicago, or other places in this country, is immaterial. If it originates in the United States it pays *domestic* tariff rates; if abroad, *lower* rates. This is our complaint, and that is the question treated by Judge Wallace. What he says about shipments from Chicago, &c., is an illustration. The table referred to by the Court on page 264 simply presents *import* rates through New Orleans and *domestic* rates from New Orleans.

Fourteenth.

The decree should be affirmed, and the case remanded to the Circuit Court with directions to fix and order the payment of "*such costs and counsel fees as shall be deemed reasonable.*" It is not assumed that this Court will thus fix and order such payment.

See Sec. 16 of Interstate Com. Act.
" Order Circuit Court directing application to be made after appeals, &c. (p. 270).

LAWRENCE MAXWELL, JR.,
Solicitor-General for the Appellee.

SIMON STERNE, Esq.,
JOHN D. KERNAN, Esq.,
Special Assistant Attorney-Gens.

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THE ACT

TO

REGULATE COMMERCE

AS AMENDED,

TOGETHER

WITH ACTS SUPPLEMENTARY THERETO.

PUBLISHED BY THE INTERSTATE COMMERCE COMMISSION.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1893.

ORIGINAL AND AMENDING ACTS.

Public No. 41, approved February 4, 1887, and in effect April 5, 1887 (U. S. Stat. at Large, Vol. 24, p. 379; Sup. to Rev. Stat., Vol. 1, p. 529). Public No. 125, approved and in effect March 2, 1889 (U. S. Stat. at Large, Vol. 25, p. 855; Sup. to Rev. Stat., Vol. 1, p. 684). Public No. 72, approved and in effect February 10, 1891 (U. S. Stat. at Large, Vol. 26, p. 743; Sup. to Rev. Stat., Vol. 1, p. 891).

SUPPLEMENTARY ACTS.

Public No. 54, approved and in effect February 11, 1893 (U. S. Stat. at Large, Vol. 27, p. 443). Public No. 113, approved and in effect March 2, 1893 (U. S. Stat. at Large, Vol. 27, p. 531). Public No. 237, approved and in effect August 7, 1888 (U. S. Stat. at Large, Vol. 25, p. 382; Sup. to Rev. Stat., Vol. 1, p. 602).

THE ACT TO REGULATE COMMERCE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Carriers and transportation subject to the act.

Act does not apply to transportation wholly within one State.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

What the terms "railroad" and "transportation" include.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Charges must be reasonable and just.

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Unjust discrimination defined and forbidden.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Undue or unreasonable preference or advantage forbidden.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Facilities for interchange of traffic.

Discrimination between connecting lines forbidden.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than

Long and short haul provision.

Commission has authority to relieve carriers from the operation of this section.

for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Pooling of freights and division of earnings forbidden.

SEC. 6. (*As amended March 2, 1889.*) That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

Printing and posting of schedules of rates, fares, and charges including rules and regulations affecting the same, terminal charges and freight classifications.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to cus-

Printing and posting of schedules of rates on freight carried through a foreign country.

Freight subject to customs duties in case of failure to publish through rates.

toms duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

Ten days' public notice of advances in rates must be given.

Three days' public notice of reduction in rates must be given.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Published rates not to be deviated from.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to

Copies of schedules of rates, fares, and charges must be filed with Commission.

Copies of contracts, agreements, and arrangements must be filed with Commission.

Joint tariffs must be filed with Commission.

Power of Commission to prescribe publicity.

such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

Ten days' notice to Commission of advance in joint rates, fares, and charges.

Three days' notice to Commission of reduction in joint rates, fares, and charges.

Power of Commission to make advances or reductions public.

It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

Joint rates, fares, and charges must not be deviated from.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

Commission may prescribe forms of schedules of rates, fares, and charges.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a con-

Penalties for neglect or refusal to file or publish rates, fares, and charges.

tempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

Continuous carriage of freights from place of shipment to place of destination.

SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Liability of common carriers for damages.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and

Persons claiming to be damaged may elect whether to complain to the Commission or bring suit in a United States court.

must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Officers, &c., of defendant may be compelled to testify.

SEC. 10. (*As amended March 2, 1889.*) That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Penalties for violations of act by carriers, or when the carrier is a corporation, its officers, agents, or employes: Fine and imprisonment.

Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and will-

Penalties for false billing, etc., by carriers, their officers or agents: Fine and imprisonment.

fully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Penalties for false billing, etc., by shippers and other persons: Fine and imprisonment.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

Penalties for inducing common carriers to discriminate unjustly: Fine and imprisonment. Joint liability with carrier for damages.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the dis-

cretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Interstate Commerce Commissioners—how appointed.

SEC. 11. That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Terms of Commissioners.

Power and duty of Commission to inquire into business of carriers and keep itself informed in regard thereto.

"SEC. 12. (*As amended March 2, 1889, and February 10, 1891.*) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute

Commission required to execute and enforce provisions of this act.

Duty of district attorney to prosecute under direction of Attorney-General.

under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Costs and expenses of prosecution to be paid out of appropriation for courts.

Power of Commission to require attendance and testimony of witnesses and production of documentary evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

Commission may invoke aid of courts to compel witnesses to attend and testify.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Penalty for disobedience to order of the court.

Claim that testimony or evidence will tend to criminate will not excuse witness.

"The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court,

Testimony may be taken by deposition.

Commission may order testimony to be taken by deposition.

or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Reasonable notice must be given.

Testimony by deposition may be compelled in the same manner as above specified.

"Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

Manner of taking depositions.

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission."

When witness is in a foreign country.

Depositions must be filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Fees of witnesses and magistrates.

SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall

Complaints to Commission. How and by whom made. How served upon carriers.

Reparation by carriers before investigation.

Investigations of complaints by the Commission.

appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Complaints forwarded by State Railroad Commissions.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

Institution of inquiries by the Commission on its own motion.

Complainant need not be directly damaged.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Commission must make report of investigations.

SEC. 14. (*As amended March 2, 1889.*) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

Reparation.

Findings of Commission prima facie evidence in judical proceedings.

Reports of investigations must be entered of record.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Service of copies on parties.

Reports and decisions. Authorized publication to be competent evidence.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Publication and distribution of annual reports of Commission.

SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such

common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Notice to common carrier to cease from violation of act.

Compliance with notice to cease from violation of act. Reparation.

SEC. 16. (*As amended March 2, 1889.*) That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question

Petition to United States courts in cases of disobedience to order of Commission.

Power of United States courts to hear and determine cases of disobedience.

Findings of fact of the Commission shall be prima facie evidence.

has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Writs of injunction or other process against carriers in cases of disobedience.

Punishment for refusal to obey writs of injunction or other proper process: Fine.

Appeals to Supreme Court of United States.

Appeals shall not operate to stay order or writs issued by the court.

Costs and counsel fees.

Duty of district attorneys to prosecute under direction of Attorney-General.

Costs and expenses of prosecutions to be paid out of appropriations for courts.

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

Petition to United States courts in cases of disobedience when trial by jury is necessary.

Findings of fact of the Commission shall be prima facie evidence.

Trial by jury.

Trial by court.

Appeals to Supreme Court of United States.

Counsel or attorney's fees.

SEC. 17. (*As amended March 2, 1889.*) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the

Interstate Commerce Commission. Form of procedure.

ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States.

Parties may appear before the Commission in person or by attorney.

Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested.

Official seal.

Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpœnas.

Salaries of Commissioners.

SEC. 18. (*As amended.*) That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States.

Secretary—how appointed; salary.

The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner.

Employees.

The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties.

Offices and supplies.

Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies.

Witnesses' fees.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Expenses of the Commission—how paid.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

Principal office of the Commission.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

Sessions of the Commission.

Commission may prosecute inquiries by one or more of its members in any

It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any mat-

ter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

part of the United States.

SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Carriers subject to the act must render full annual reports to Commission.

What reports of carriers shall contain.

Commission may prescribe methods of keeping accounts.

SEC. 21. (*As amended March 2, 1889.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

Annual reports of the Commission to Congress.

SEC. 22. (*As amended March 2, 1889.*) That nothing in

this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act.

Persons and property that may be carried free or at reduced rates.

Mileage, excursion, or commutation passenger tickets.

Passes and free transportation to officers and employees of railroad companies.

Provisions of act are in addition to remedies existing at common law. Pending litigation not affected by act.

NEW SECTION (*Added March 2, 1889*). That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think

Jurisdiction of United States courts to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars or other transportation facilities.

Peremptory mandamus may issue notwithstanding proper compensation of carrier may be undetermined.

proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.

Remedy cumulative, and shall not interfere with other remedies provided by the act.

Public No. 41, approved February 4, 1887, as amended by Public No. 125, approved March 2, 1889, and Public No. 72, approved February 10, 1891.

An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled "An act to regulate Commerce," approved February fourth, eighteen hundred and eighty-seven, and amendments thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Attendance and testimony of witnesses and production of documentary evidence compulsory before the Commission, and in any case, criminal or otherwise, in the courts.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Penalties: fine or imprisonment, or both.

Public No. 54, approved, February 11, 1893.

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Driving-wheel and train brakes.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Automatic couplers.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act. When carriers may lawfully refuse to receive cars from connecting lines or shippers.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. Grab irons and handholds.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of rail- Standard height of drawbars for freight cars.

roads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Penalty for violation of the provisions of this act.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

Duty of United States district attorney.

Duty of Interstate Commerce Commission.

Exceptions to the act.

Power of Interstate Commerce Commission to extend time of carriers to comply with this act.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Employés not deemed to assume risk of employment.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Public No. 113, approved, March 2, 1893.

An act supplementary to the act of July first, eighteen hundred and sixty-two, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and also of the act of July second, eighteen hundred and sixty-four, and other acts amendatory of said first-named act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain, and operate, for railroad, Governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid.

Government aided railroad and telegraph lines must themselves maintain and operate

SEC. 2. That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

Connecting telegraph lines.

Equal facilities required.

SEC. 3. That if any such railroad or telegraph company referred to in the first section of this act, or company operating such railroad or telegraph line shall refuse or fail,

in whole or in part, to maintain, and operate a telegraph line as provided in this act and acts to which this is supplementary, for the use of the Government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be, under such rules and regulations as said Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerned shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners: *Provided*, That the said Commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

Complaints to Interstate Commerce Commission.

Duties of the Commission where complaint is made.

Commission may institute inquiries on its own motion.

Duty of the Attorney-General under this act.

SEC. 4. That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

SEC. 5. That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies, who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this act and by the acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the Government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by, or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and, on conviction thereof, shall in every such case be fined in a sum not exceeding one thousand dollars, and may be imprisoned not less than six months; and in every such case of refusal or failure the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be guilty thereof, in the circuit or district court of the United States in any State or Territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such State or Territory, and such service shall be held by the court good and sufficient.

Penalties for failure to comply with the provisions of this act or the orders of the Interstate Commerce Commission.

Actions for damages may also be brought.

SEC. 6. That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such

Duty of railroad and telegragh lines subject to this act to file copies of contracts and a report with the Commission.

Annual reports to the Commission.

claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies annually hereafter to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use, and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such reports or any report as may be called for by said Commission, or refuse to submit its books and records for inspection, such neglect or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the Attorney-General of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

Penalties for refusal to make reports to Commission.

Duty of Attorney-General to prosecute.

Right of Congress to alter, amend or repeal.

SEC. 7. That nothing in this act shall be construed to affect or impair the right of Congress, at any time hereafter, to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal as, in the opinion of Congress, justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster-General now has under title sixty-five of the Revised Statutes to fix rates, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission.

Equity rights of the Government preserved.

Public No. 237, approved, August 7, 1888.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 321.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

against

THE INTERSTATE COMMERCE COMMISSION,
Appellee.

IMPORT RATE CASE.

RE-ARGUMENT FOR THE INTERSTATE COMMERCE COMMISSION.

SIMON STERNE,
JOHN D. KERNAN,
Of Counsel for the Interstate Commerce Commission.

The Evening Post Job Printing House, New York.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant, AGAINST THE INTERSTATE COMMERCE COMMISSION, Appellee.	No. 321.

RE-ARGUMENT FOR THE INTERSTATE COMMERCE COMMISSION, BY SIMON STERNE.

STATEMENT.

A proceeding was commenced before the Interstate Commerce Commission in November, 1889, by the New York Board of Trade and Transportation against a number of railway companies - the Pennsylvania Railroad Company being the first defendant named, and the Texas and Pacific Railway Company, the defendant and appellant herein, being afterwards brought in as a party defendant—in which it was claimed by the Board of Trade and Transportation that an unjust discrimination was made by railway lines starting at the eastern seaboard of the United States, in favor of

goods coming from abroad under a joint ocean and railroad tariff, and against domestic traffic originating at the seaboard and going thence to western terminals and carried under substantially similar circumstances and conditions from such seaboard westward. That the railroads' share of the through rate, which included the steamship rate, was frequently fifty per cent. less, and sometimes more than fifty per cent. less, than the rate on similar goods carried for American traders and producers, manufacturers or shippers from the same point at the seaboard to the same point of delivery in the West; that the railroad corporations had failed to separate in their published tariffs the inland and ocean charges, and that, consequently, the through rate was in substance a secret rate given to the foreigner over the American railways from the point of beginning of such railways to the point of delivery. It was claimed, therefore, that these facts constituted an undue and unreasonable discrimination in favor of persons, firms, corporations and localities interested in the transportation of imported traffic from the seaboard under through bills of lading, and that this subjects, and has subjected, many persons, firms, corporations and localities to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and contemporaneous services under substantially similar circumstances and conditions. That there were no circumstances or conditions relating to imported traffic which could justify any difference in rates between imported traffic transported to any place in the United States from a port of entry, and other traffic from such port. That the inland tariff must be published, and must, by law, be the same for all such freights.

After answers had been interposed by several of the railroad corporations first named as defendants, the Commission, by order and on petition, ordered a large number of other railway companies to be joined in the proceeding. Among the companies

thus made parties defendant was the St. Louis, Iron Mountain and Southern Railway Company, and it, by its answer, suggested to the Commission that inasmuch as the Texas and Pacific Railway Company, which was a party to the combined rate made by the St. Louis, Iron Mountain and Southern Railway Company, would be seriously affected by the decision in the case, it should have an opportunity to be heard in the premises (fol. 72, Transcript of Record). Thereupon, by an order (fol. 116–118 of Record) entered on the 21st of April, 1890, the Texas and Pacific Railway Company, together with a number of other transportation companies particularly known as the Trans-Continental Lines, was made a party defendant to the action originally brought against the Pennsylvania Railroad Company and others. The complaint was served upon the Texas and Pacific Railway Company and it appeared and filed its answer in the proceeding before the Interstate Commerce Commission. By this answer it admitted that it carried imported goods at lower rates than those it had contemporaneously charged for like goods originating in the United States and not imported from Europe, and alleged that it did, and does so, because through-shipments from a foreign country to the interior of the United States differ in circumstances and conditions from shipments originating at the American seaboard bound for the same interior points. It submitted various foreign freight tariffs as part of its answer, and claimed that it had the legal right to accept for its share of the through rate a lower sum than it receives for domestic shipments to the same destination from the point at which the imported traffic enters the country, and which point is its own eastern terminus. It also claimed that the controlling forces which made the rates that it saw fit to charge, were the water line from Europe around Cape Horn to the Pacific coast, the water line directly to the Mexican seaports, the water line via the Isthmus of

Panama to the Pacific coast, the Canadian water lines, and the water and rail lines within the United States, reaching the western coast (fol. 165 of Record).

A number of the railway companies that had been made parties defendant to the proceeding claimed that they had conformed to the order of the Commission of March 23, 1889, which provided that imported traffic carried to places within the United States from a port of entry, whether such port of entry be situated in this country or in a foreign country, is required to be taken on the inland tariff governing other freights, and the proceedings were thereupon dismissed as to the Erie, the Lake Shore and affiliated companies, the West Shore, Boston and Maine, Central of New Jersey, Philadelphia and Reading, New York Central, Delaware, Lackawanna and Western, and the Grand Trunk railway companies.

The Commission found a large number of corporations guilty of the unjust discrimination against the domestic shipper, which had been charged, and found, as admitted by the Texas and Pacific Company, the rates charged on the schedule contained on page 78 of Record, folio 177, which were taken from the schedules referred to in the answer of the Texas and Pacific Company, pages 61, 62 and 63 of Record. This statement of rates, repeated as Exhibit 36, on pages 132 and 133 of Record, giving the through rate from Liverpool to San Francisco, and from New Orleans to San Francisco, shows a discrimination, as stated in the findings of fact of the Interstate Commerce Commission, of from fifty to two hundred per cent. in favor of foreign products shipped on through bills of lading from Liverpool and Southampton to San Francisco, and carried, as far as the route from New Orleans to San Francisco is concerned, under precisely the same traffic circumstances and conditions as like goods produced in this country going from New Orleans to San Francisco and so discriminated against.

The Interstate Commerce Commission thereupon filed its findings of facts which are made, by the act, *prima facie* evidence. It found that the difference in rates indicated by the schedule on page 78 of Record, and likewise by Exhibit 36, page 132 of Record, had been made by the Texas and Pacific Railway Company, and adjudicated that such a difference in rates was a violation of the various provisions of the Interstate Commerce Law and was unlawful; and ordered (p. 129 of Record) the Texas and Pacific Railway Company thereafter to desist from making such difference in rates, and required the Texas and Pacific Railway Company and other defendant companies to cease and desist from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon a through bill of lading and destined to any place within the United States, upon any other tariffs than their respective published inland traffic covering the transportation of the like kind of domestic traffic, in the elements of bulk, weight, value and expense of carriage, between any such port of entry and any such place of destination within the United States.

The Texas and Pacific Railway Company, defendant and appellant herein, having continued to disobey the order of the Interstate Commerce Commission, an action was commenced in the Circuit Court of the United States for the Southern District of New York, by the Interstate Commerce Commission, to compel obedience to its order made in the premises (Record, fol. 1). In this action the defendant first filed a plea to the jurisdiction, but that was disposed of adversely to such defendant, and thereupon it interposed its answer (p. 155 of Record), in which it admitted that Exhibit 36 (p. 132 of Record) truly exhibited the difference of rates between the foreign points to San Francisco via New Orleans as com-

pared with the rates charged from New Orleans to San Francisco (fol. 254, p. 156), but denied that the order was a lawful order (fol. 255), and averred that it had a right to make the discrimination in rates complained of (fol. 256 of Record) by reason of the competition of steamship lines from Liverpool and London to San Francisco by way of Cape Horn and steamship and sailing vessels in connection with railways across the Isthmus of Panama. The defendant placed its justification for making such discrimination upon the fact that if it were not to do so, "it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and imported merchandise from London and Liverpool, England, to San Francisco, California, would be driven from that business, and would lose the revenue derived by it therefrom, which is considerable, and is important and valuable to it, as shown by the fact, which it avers, that the property in the transportation of which it participated from foreign countries, via the port of New Orleans to San Francisco, California, was, during the year 1891, 8,165,000 pounds" (fol. 256 of Record), and claimed that if it were compelled (fol. 259) to charge upon such traffic the local rates from New Orleans instead of meeting the various conditions aforesaid, it would be prevented from engaging to any considerable extent in said competitive traffic at any time to its great loss and injury and without benefit to any one except its competitive carriers aforesaid, many of which are not subject to the act to regulate commerce or other laws of the United States.

There were various argumentative matters contained in the answer, but its substance was: "We continue to make the discrimination, because competition forces it upon us." No new question, except a jurisdictional one, is raised by the answer. On petition and answer, therefore, by consent, no claim being made by defendants that they could

rebut the facts as found by the Interstate Commerce Commission on any trial before the Circuit Court of the United States, and the findings of facts of the Commission being, by the law which was appended to the Commission's bill of complaint herein, made *prima facie* evidence, no question of fact other than that which was presented before the Commission, and those questions of fact alone to be found in the findings of the Commission, can be considered by this Court. The defendant rests its case on an effort to justify the charge that it violates the first, second, third and fourth sections of the Interstate Commerce Act, on the ground of the importance of the traffic which it otherwise would lose if it did not make such a preferential charge in favor of the foreign traffic, and claims that the circumstances and conditions as to the origin of the traffic, and as to the competitive elements surrounding it, are so dissimilar as to justify such a difference of rates (pp. 158, 159, 160 and 161 of the Record).

The defendant admits, therefore, its disobedience of the order of the Commission. It admits the findings of fact of the Commission by not denying the same. It specifically admits the preferential rates made by it. It admits the service of the order upon it. It refuses to comply with, and openly avows that it is justified in its disobedience to, this order of the Interstate Commerce Commission by business conditions, which it claims the right to consider in making its tariff rates, irrespective of the Interstate Commerce law, and asserts that such Interstate commerce law virtually excludes from its purview traffic coming from foreign ports, because it is claimed that in the case of such traffic, the circumstances and conditions under which it is brought to the railway are changed.

This brings us to the consideration of the main questions. First, whether, in express terms, the kind of traffic referred to by the answer of the defendant is or is not included within the general

scope, and subject to the regulative control, of the Act of Congress, known as the "Act to Regulate Commerce," of February 4, 1887; and, secondly, whether the words "similar circumstances and conditions," in the Interstate Commerce Act, do not necessarily refer solely to the circumstances and conditions under which the railway carries the traffic, and not to the infinite variety of circumstances and conditions under which the traffic is produced, or to the source of supply of such traffic, or the comparative conditions which may exist with reference to such traffic in lands other than our own.

POINTS.

I.

The Interstate Commerce Act in terms applies to traffic of foreign origin as well as to that of domestic origin, and includes, under its inhibitory and punitive clauses against discrimination, all traffic coming from a foreign port to any point in the United States, and does not allow any exception from such provisions which would, either in terms or by implication, permit any railway company to discriminate in favor of foreign products against home products, by giving preferential or discriminating rates in favor of the former as against the latter.

The Interstate Commerce Act in express terms, in its first section, provides as follows:

> "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement,

> for a continuous carriage or shipment from * * * any place in the United States * * * through a foreign country to any other place in the United States, and also to the transportation, in like manner, of property shipped from any place in the United States to a foreign country and carried from such a place to a port of transshipment, *or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or of an adjacent foreign country.*"

Therefore the provisions of the act, and all of them, apply in terms to all foreign merchandise shipped from a foreign country to a foreign port, and from such foreign port to any place in the United States, and carried to such place from a port of entry in the United States. Consequently to merchandise shipped from any part of England to New Orleans, a port of entry in the United States, and shipped thence to any place in the United States, to wit, San Francisco, there applies, in the first place, that provision of Section 1, by which every unreasonable charge is prohibited, and declared to be illegal, and secondly, Section 2, that every carrier subject to the provisions of the Interstate Commerce Act (including one engaged in traffic from England via New Orleans, a port of entry in the United States, to San Francisco, a place in the United States, as provided in the first section of the act), shall not directly charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than is charged, demanded or received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and that the carrier shall not indirectly make any such discrimination either by rebates, drawbacks, or any other device.

I deliberately transpose the words of the act, be-

cause it seems that the appellant's claim is, that the second section of the act is not contravened, unless there is a special rate, rebate, drawback, or other device forming an indirect preference, and that a direct and avowed discrimination is sanctioned by the second section of the act. The second section clearly means that no direct charge creating any preference shall be made, and no indirect charge shall be made resulting in the same thing, giving several instances of such indirect charges, and including in a general phrase "all other devices" which may produce such a result, any devices not already specifically mentioned. The third section of the "Act to Regulate Commerce," which makes it unlawful for any common carrier, subject to its provisions, to make or give any unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, also prohibits the practices of the defendant.

The second and third sections of the act regulating interstate commerce, providing that, under similar circumstances and conditions, the traffic of railways shall go forward at the same rates without discrimination, preference or advantage as between shippers, are rigid and should not be circumvented or nullified by excuses of any kind on the part of the carrier, nor should such excuses be sanctioned by the courts.

The first section of the act, which prohibits unreasonable and unjust rates, allows necessarily on the part of a court or commission the exercise of a discretion in determining the reasonableness or justice of the toll.

The fourth section of the act also allows a discretion to the Commissioners, when reasons are pre-

sented showing why the railroad company should be permitted to disregard the long and short haul clause. The terms of the act necessarily take such discretion away from the railway company, and without such permission from the Commissioners the carrier cannot infringe its provisions. The Commission may take into consideration all the questions which are raised here as to relieving the railway company from the necessity of compliance with the long and short haul clause, but the carrier may not take those same questions into consideration himself. He is bound, in the absence of a permission from the Commission, to adhere rigidly to the rule laid down by the act.

When English decisions of cases anterior to the English statutes of 1880 and 1888 are cited as rules of interpretation of the Interstate Commerce Law, such citations should be taken in connection with the fact that until the passage of the Railway and Canal Traffic Act of August, 1888 (51 and 52 *Vic.* C., 25) the English statute law had not been as rigid in its prohibitions of certain offenses by carriers as the Interstate Commerce Law has been, and that distinction has been recognized by our court of last resort.

This Court has recognized, in the case of the Interstate Commerce Commission against the Baltimore and Ohio Railroad Company, 145 U. S., page 284, the distinction between the English cases as applied to the English statute and as applied to the American statute. Justice Brown says:

> "The traffic acts" (English acts) "do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the 'long and short haul' clause of the act, or would be open to the charge of unjust discrimination."

On the previous argument of this case there was some discussion as to the light to be thrown upon this case by the English railway

cases. A careful re-examination of those cases has led me to the conclusion that without a very thorough analysis of the legislation as well as the cases, the Courts are likely to be misled as to their bearing. I am endeavoring fairly to assist the Court to come to a correct conclusion by a careful examination of the bearing of these cases.

I now cite, for the purpose of comparison, the parallel provisions of the acts, English and American.

ENGLISH ACT.

SEC. 90, Railway Clauses Act. 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railways so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine *passing only over the same portion of the line of railway under the same circumstances;* and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor or against any particular company or person traveling upon or using the railway."

AMERICAN ACT.

SEC. 2. Act to Regulate Commerce. 1887.

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other

device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

ENGLISH ACTS.

SEC. 2. Railway and Canal Traffic Act, 1854.

SEC. 11. Railway and Canal Traffic Act, 1873.

"* * * And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

AMERICAN ACT.

SEC. 3. Act to Regulate Commerce.

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

There was no English provision forbidding the lower freight charge for the longer haul, and all

such cases, when they occurred, came up under the general provisions of the acts against undue preference or unjust discrimination.

The fourth section of our act, however, distinctly prohibits it, and gives the terms under which an exception can be made, and that is by permission after investigation of the Interstate Commerce Commission; and, therefore, in terms excludes the Court from the consideration of any other cases of exception. This exception is created by assent of the Commission alone. That section provides as follows:

> "SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provision of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

A Select Committee on Railway Rates, consisting of twenty-seven members of Parliament, among whom were all the leading experts in Parliament upon questions of railways, such as, for instance, Sir Henry Tyler and Sir Edward Watkin, was appointed in February, 1888, in consequence of a very active agitation in England arising from complaints

of grievances against railways made by traders and producers.

This committee sat for a period of eight months, and three huge volumes of testimony were taken, a large part of it upon a question analogous to the one at bar. It was complained that grain and meat products were taken by steamships from America, and by railway from English ports of entry on a through bill of lading, to interior stations in England (for instance, on a through bill of lading from New York or Boston, by way of Liverpool, to London) at a lower rate for the railway carriage than the local producer could get the same products carried for the shorter distance between the English port of entry and the same interior stations in England (for instance, from Liverpool to London).

The committee united in a report in which, on page 9 of the 3d volume, they say:

> "Farmers complain that imported agricultural products are given a bounty over home produce, by being carried at a lower rate; that foreign corn and meat are carried from Liverpool to London for less than English corn and meat; that American cattle are conveyed from Glasgow to London for less than Scotch cattle; that cattle landed at Newcastle are carried inland for less than cattle reared in Northumberland and Durham; that foreign fruit and hops are carried from Boulogne or Flushing to London for less than fruit and hops from Ashford or Sittingbourne. Wire manufacturers complain that Belgium wire and other goods are brought from Belgium to Birmingham for less than similar goods are charged from Birmingham to London. Makers of chemicals complain that coal which they use is made to pay higher rates than coal sent past their works to Liverpool for exportation to their foreign rivals. Limerick complains that foreign bacon and provisions are carried from Liverpool to Limerick at much less rates than is charged for Limerick bacon over the same route to the same port. Bradford complains that the export trade from both Manchester and Bradford enjoys rates which are preferential as compared with those

of the home consumption trade. In short, the complaint is frequently heard that railway companies prejudice home producers by low import and export rates.

Your committee think that many of these differential charges afford substantial grounds for complaint, but they do not consider it necessary to express an opinion as to how far these differential charges constitute undue preferences, because that is a point which the proper tribunal has full power to determine, and each case must be considered on its merits.

At the same time it must be admitted that when a farmer sees American meat carried at a lower rate than his own; or when a manufacturer, in a manufacturing district, has his profits in that market reduced by a competitor at a distance, who is brought into the market by the lower rates given to him, it is not surprising that there should be complaints, and that attempts should made, and from time to time repeated, to fix some standard by which rates shall be determined. One form in which this proposal has been made is, that the rate ought to bear some fixed proportion to the cost of the service performed; or, in other words, that the companies ought not to be allowed to make a higher profit on one part of their traffic than on another."

Again, on page 5, the report says:

"Numerous complaints have also been made that foreign produce is carried at lower rates than home produce under *similar circumstances and conditions.*"

Now, here we have the precise terms of the American statute used in the report of this committee, in their proper sense, showing that in the committee's opinion the similar circumstances and conditions relate wholly to the traffic, and that so long as the traffic moves on the lines of domestic railways under similar circumstances and conditions as to the conveyance, no dissimilarity either of circumstance or condition occurs because of the foreign competition of railway lines

in America, Australia or elsewhere, or of the competition of the steamship lines which bring the goods to England, and could bring them to London direct in competition with ocean vessels to Liverpool or Southampton and railways to London.

The recommendations of the committee were followed by the statute known as the Railway and Canal Traffic Act of 1888 (51st and 52d Victoria, Chapter 25), which among its provisions contains the following:

> "SECTION 27.--1. Whenever it is shown that any railway company charges one trader or class of traders, or the traders in any district, lower tolls, rates or charges for the same or similar merchandise, or lower tolls, rates or charges for the same or similar services than they charge to other traders or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.
>
> "2. In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction of the matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other consideration affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interest of the public the traffic in respect to which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant, *provided that no railway company shall make, nor shall the Court or Commissioners sanction any difference in the tolls, rates or charges made for, or any difference in the treatment of home and foreign merchandise, in respect of the same or similar services.*
>
> 3. The Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than

> is made to any other persons for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same lines of railway."

This put the English statutes with reference to foreign and home traffic precisely upon the basis of our American statute.

By the concluding paragraph of Subdivision 2 of Section 27 of the English act, the power is taken away from both the courts and the Commissioners to allow an exception to be made in the case of foreign merchandise as against English goods, because the Englishman would thus be subjected to an undue competition, although such exception is allowed to be made as to other traffic (where the interest of the public—not that of the railroad—demands it) by Sub. 3 of Sec. 27 of the same act. Our act (Section 1) in making all the provisions which forbid inequality or discrimination or undue preference apply in terms to foreign goods, made the very same provision in 1887, only in different language, which was inserted in the English law by the second and third paragraphs of Section 27 of the Statute of 1888.

The general rule of interpretation herein contended for, namely, that under the fourth section of the act the Railway Company cannot judge in the first instance of the existence of the competition which may be considered by the Commission, is reaffirmed in the case of

Behlmer v. *The Memphis & Charleston R. R. Co. & ors.*, decided June 27, 1894; 4 Int. Com. Rep., 521.

See also

Union Pacific Ry. Co. v. *Goodridge*, 149 U. S., 679.

Until the passage of the Interstate Commerce law, the railway corporations of the United States, except in so far as their action was limited as to traffic local to the States, by direct or indirect

regulation under State statutes, were free, as to international or interstate traffic, to adopt their own railroad policy; and this railroad policy has been stated by them in axiomatic forms, and the application of this policy to their daily business was regarded by them in the light of a franchise, interference with which was, from their point of view, an infringement of their substantial rights of property.

Among the axioms that the railway corporations thus sought to establish are three: The first was to charge what the traffic would bear; the second, that they must meet competition from any quarter by a cut in rates, even if by so doing they placed a locality or set of persons or individuals nearer to the market under disadvantages and discriminations of the most destructive character; and the third was, that the local traffic, which was entirely at their mercy, was theirs to deal with as they saw fit, and that out of it they could recoup the losses from their railway wars for control of or participation in through traffic.

The result of the enforcement of these railway policies was found to lead to the destruction of the business of individuals, and to endless and persistent discriminations, unreasonable prejudices, and innumerable disadvantages to local interests. The fact that the courts of law were, to a certain extent, open for the redress of these grievances, was a wholly inadequate protection to the community, because the delays and expenses of a litigation carried on between a private person, however grievously injured, against the better legal machinery of the railway corporation, and the ability with which the latter's case was generally prepared and argued, created at the outset such a disparity between the respective powers of the litigants, that, whilst theoretically such a redress was open to the injured person, yet, practically, the doors of justice were closed to him. Decisions are, sometimes at least, as Napoleon said of Providence in warfare, on the side of the heavier legal artillery.

This situation created the necessity for the substitution of a national interstate policy for that which had theretofore worked so grievously upon individuals and localities throughout the length and breadth of the land, and this necessity was crystallized into form by the adoption of the Interstate Commerce Law of 1887, and its amendments. By the light of that law and the evils which that law was intended to overcome, the policies of railway companies are now to be judged, whenever their performances are challenged in courts of justice, and not by the light of the railway companies' own interpretation of their rights and policies which that law and its amendments were intended to supersede.

The appellant railway corporation, in support of a discrimination against New Orleans shippers in favor of goods shipped from Liverpool to San Francisco—breaking bulk necessarily at the port of entry of New Orleans, as they must be transshipped from steamer to rail before they can be put upon a car at that point—which are carried to San Francisco and other westerly points at rates varying from 50 to 200 per cent. less than those charged for domestic traffic from New Orleans to San Francisco and such westerly points, although the latter is shipped and carried under precisely similar circumstances and conditions as the former, contends for its justification: (1) that it must meet the competition of the sailing vessel and steamship lines from Liverpool to San Francisco by the rate which it is making, otherwise that business would go from Liverpool or Southampton around Cape Horn to San Francisco, or from Liverpool or Southampton *via* Aspinwall to Panama, and thence along the coast of Central America, Mexico and California to San Francisco; (2) that it does not make the rate, but that the rate is substantially made for it by this competition, and that it cannot be said, therefore, to have been animated by any other motive than the desire to grasp and hold traffic which, unless the

rate is so met, would go by way of these other lines, and consequently cannot be charged with malignant motives against the commerce of New Orleans in the making of this rate; that, furthermore, New Orleans cannot escape the injury of this destructive discrimination against its products and commerce, because the goods would reach San Francisco at the lower rate in any event, even if the Texas and Pacific Railroad Company were restrained from carrying a portion of them; (3) that no public necessity exists for such interference, but that, on the contrary, sound business policy would declare that it would be impolitic to deprive the Texas and Pacific Railroad Company—as the injury to New Orleans must inevitably be done—of a share in the profits resulting from the working of this injury; and that the Interstate Commerce Law does not, and was not intended, to interfere with the railroad company in this practice of meeting what they call foreign competition.

The Court will take judicial notice of the fact that the sailing vessel and steamship routes to San Francisco were established long prior to the construction of the Texas and Pacific Railroad and Southern Pacific Railroad, and that, therefore, this is not an instance of a competition of traffic met by the railroad company after its construction, to keep which, at even some sacrifice of rates, is one way of avoiding a great diminution of revenue arising from a new menace to the company's reasonable expectation of the carriage of the traffic, with the view to which the railway was constructed. The traffic, with reference to which this contention is made, is one for which the railway company voluntarily enters into competition with these water routes, in so far as the California traffic is concerned, and such railway company, therefore, reaches out after a business which is not fairly its own. It is not a competition in their own field; they do not reach Liverpool or Southampton any more than they reach any other part of the world outside of the

United States, and their rates are in no true sense of the word competitive.

The English sailing vessel and steamboat rates to San Francisco, either by the Cape or by way of the Isthmus of Panama, should not be considered as competitive rates to the Texas and Pacific Railroad Company in America, because the only way the competition is created is by the Texas and Pacific Railroad Company reaching out for business which is not fairly its own. The railway company itself inaugurates and makes the competition, the existence of which it urges as an excuse for these greatly discriminating rates. In other words, it is not called upon to meet a competition arising unexpectedly, but it creates the conditions which it urges as an excuse for its own wrongdoing.

Even in a railway sense, there is no competition between a railway from New Orleans to San Francisco and steamship or sailing vessels from Southampton to San Francisco by a wholly different route, starting at a wholly different point in another quarter of the globe 3,500 miles away. There is a competition of markets (between London and New Orleans, for instance) for the San Francisco trade, but that is not a railway or transportation competition with the Texas and Pacific Railway Company.

The English producer may have the advantage of cheap transportation facilities by water to an American port of consumption, but it can no more be truly said that the open water route, free to all the nations of the earth, from Southampton to San Francisco by way of the Cape, is competitive to the Texas and Pacific Railway Company, than that the water route from Hong Kong to San Francisco is competitive to the Texas and Pacific Railway Company. The existence of the water route from Hong Kong to San Francisco may impair the income of the Texas and Pacific Railway Company. If there were no such water route the silks of Italy might go over the Texas and Pacific Railroad from, say, Naples to New Orleans, and from New Orleans to San Francisco

in preference to silks from China. But would the Texas and Pacific Railway Company be permitted, by reason of a so-called competition of cheap ocean rates from Hong Kong to San Francisco, to carry a bale of silk for Italian silk producers at a rate of one-third of what would be charged for a bale of silk coming from, say, Paterson to New Orleans to go to San Francisco, on the ground that thus only can the railway company meet the competition which the Hong Kong sailing vessel makes, and that, but for the lower charge made to the Italian silk producer, he could not get the business of placing Italian silks in the San Francisco market? Competition so remote, in the technical language of the railway world, is not considered competition of carriage, but competition of markets. To constitute the competition of carriers they must start substantially from the same point, reach the same terminus, and serve substantially the same constituency.

Down to 1887 the policy on the part of railway companies of treating local traffic as the paying traffic and carrying through traffic at any rate that could be obtained for it in order to get such traffic away from competing companies, no matter with what result to localities or individuals, might have explained and possibly justified such conduct to the railway world, but in that year the policy of the United States Government, to which the railways were bound thenceforth to conform, was established, and that policy forbids the railway companies to take solely into consideration their own necessity to live, or even mainly their desire to grasp traffic by underbidding carriers to whom the traffic would naturally go, and particularly and specifically forbids this being done at the expense and to the sacrifice of the interest of either places or persons in the United States. It is not necessary to point out a specific injury to a town or individual in order to insist upon the remedial interposition of the Interstate Commerce Tribunal and courts of justice of the United States. The Interstate Commerce Act

contemplates the possibility that, with the exception of the public injury laid down in the act, there may be no injury which can be measured in dollars and cents, and declares that the courts of justice shall not let a plaintiff go remediless, because no such specific special injury is shown. At the end of the 13th section of the Interstate Commerce Act it is specifically provided that no complaint shall, at any time, be dismissed because of the absence of direct damage to the complainant. By the 15th section it is provided that if it appears to the Commission that any of *the provisions of the law have been violated or that any injury or damage has been sustained* by any party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, &c. And by the 13th section of the act the Commission likewise has the power "*sua sponti*," as my learned adversary says, to investigate and make orders for the purpose of compelling strict compliance with the law.

But, can it be said that no injury to New Orleans is done because the conduct of the Texas and Pacific Railroad Company, in carrying goods at a reduced rate to enable it to get the goods to carry, is a self-created competition with the ocean traffic from England to the Pacific ports? The participation of the Texas and Pacific Railroad Company in such competition has a tendency still further to depress freight rates to San Francisco. It adds one element to the competition for the traffic. Even at the same rate, the Texas and Pacific Railroad Company offers, as an additional element in the competition, the shorter route to San Francisco, compared with the sailing vessel or steamer around Cape Horn, or the triple transshipments to San Franscisco, to wit: from Liverpool to Central America, across Central America by rail, and by steamboat or vessel from Central America up the Pacific to San Francisco. If such a policy

be sanctioned on the ground of the competition as to rates between New Orleans and San Francisco, then the principle upon which it is so sanctioned will be equally applicable to every case of tin, every bale of dry goods coming from any port in Europe to anywhere in the interior of the United States. There are steamers which go direct from Liverpool to Detroit by way of the Welland Canal through Canada to our great lakes. Can the Pennsylvania Railroad Company for that reason carry tin on a through bill of lading from Liverpool to Detroit by way of Pittsburgh, at a greatly reduced rate, in order to meet the competition of the steamer laying down its freight at Detroit, the freight rate on which from Liverpool to Detroit is one half of the freight rate made from Pittsburgh to Detroit?

If this Court will hold that simply because the Railway Company wants to cut into the steamship business from Southampton or Liverpool to San Francisco and reaches out for part of that business, it has a good excuse for charging, for goods which have come from Europe, and are carried from New Orleans and destined for San Francisco, one-half the rates charged to the inhabitants of New Orleans, and, indeed, to every shipper in the United States, for goods of the same class shipped *via* New Orleans to San Francisco, why is not the existence of low water rates from Southampton and Liverpool to San Francisco, on cottons, cutlery, silks and all other kinds of merchandise a still better reason for the New York Central, the Pennsylvania, the Baltimore and Ohio, and their affiliated companies, making a rate to San Francisco for the benefit of American manufacturers of like kinds of goods, of one-third of what they make, say, to St. Louis, which is but one-third the distance, so as to enable the American producer to participate in the San Francisco market and to overcome, by the concession of the transcontinental lines, the low freight rates from Southampton or Liverpool to San Francisco charged by the ocean lines to the foreigner?

This is certainly a more patriotic justification, and one more consonant with public interest than that which is urged by the carrier corporation in this case. What, then, becomes of all the provisions of the Interstate Commerce Law, requiring that rates shall be just, that they shall be equal, and that regard shall be had to distance in the making of the rates—so that natural geographical advantages shall not be overcome by the fluctuating and arbitrary conduct of the carrier corporations subject to the act—and what becomes of the main purpose of the Interstate Commerce Act, which was to drive the Railway Companies out of the business of being a small Providence of their own, arbitrarily dispensing prosperity or adversity? If cost of service is the rule, we have something certain to guide us; but once let the element of competition of markets or persons enter into the field of consideration and the whole scheme of regulation is defeated. By the Interstate Commerce Act there was substituted, for the chaotic and unjust condition theretofore prevailing, a national policy by which the field of rates was regulated in accordance with certain and well-defined rules, so as to protect every locality and individual in the wide domain of the United States which had theretofore been at the mercy of irregular, fluctuating and discriminating rates, justified solely on the ground of competition.

It is surely the safer and wiser course to adhere to the policy laid down by the Government, that there shall no longer be a discrimination against the home producer, against our own community—a policy defined in the first section of the act, and which, though not in terms, yet in spirit says to the railway companies exactly what the English Act of 1888 says to the English railway companies by Section 27 of 51 and 52 Victoria, Chapter 25, namely, that no railway company shall make, nor shall the Court or Commission sanction any difference in tolls, rates or charges made for, or any difference in the treatment of, home and foreign

merchandise in respect of the same or similar services, whatever the competition.

Let us test by an illustration as to passenger traffic the rule which the appellant railway company seeks to apply as to freights coming from Europe. Passengers as well as goods can go from England to San Francisco by way of the Isthmus of Panama or around the Cape. Let us assume that the charge by either route from England to San Francisco is $100. Let us further assume that the steamer rate from Liverpool to New Orleans is $80. Let us further assume that the rate from New Orleans to San Francisco for passengers starting at New Orleans on the Texas and Pacific Railroad is $70. Would it be permissible for the Texas and Pacific Railroad Company to say that an Englishman who has arrived at New Orleans by the steamer from Liverpool or Southamptom and desires to go to San Francisco, can get his ticket from the Texas and Pacific Railroad Company's office in New Orleans for $20 as against $70 paid by the American passenger from New Orleans to San Francisco, sitting side by side with him, and could the Texas and Pacific Company justify that discrimination on the ground that thus only are they enabled to share in the passenger traffic from Europe to San Francisco?

II.

The provisions of the second and third sections of the Interstate Commerce Act are rigid rules of action, which may not be disobeyed by the carrier for any reasons of expediency or business considerations whatever. They are declarations of a public policy superior to any views of policy adopted by the railways, and if to be changed, change should not be permitted to be made by a disregard of the law, but by an amendment thereof by the Congress of the United States.

(*a.*) Independently of decisions, the words "substantially similar circumstances and conditions," used in the Interstate Commerce Act, judged by their context and meaning and their relation to other words used in the act, have reference to the transportation service of the railway alone, and not to any other "circumstances or conditions" disconnected from the specific railway service rendered in the transportation of the traffic.

(*b.*) Even if it should be held that under Section 2 the "substantially similar circumstances and conditions" may leave open for the consideration of the railway officials "circumstances and conditions" disassociated from the traffic, Section 3 excludes the words "substantially similar circumstances and conditions," and all undue and unreasonable preferences or advantages are forbidden under that section of the act, irrespective of any dissimilar circumstances and conditions whatsoever.

(*c.*) The same rule which applies to the second section of the act, applies to the fourth section of the act, where the words "similar circumstances and conditions" again appear. In this section, these words relate to the traffic service only, and not to circumstances and conditions which are independent of the traffic service of the railway; and if such circumstances, independent of the traffic services, are to be considered at all, they are to be weighed by the Commissioners only on the question of relieving the railway company, on its application, from the operation of that section of the act, and from the duty imposed by the section as to long and short hauls.

(*d.*) The considerations of expediency which must be weighed by the Interstate Commerce Commission in suspending the operation of the fourth section of the act, either in particular cases or in classes of cases, are not open to and are not permitted to en-

ter into the determination of railway charges by the railway company without such suspending order under Section Fourth.

The English cases shed considerable light on the proposition that the words "like circumstances and conditions" are, in the intention of the Legislature, limited to "circumstances and conditions" of traffic only. The English statutes use the words "like circumstances." Our statute says "substantially similar circumstances and conditions." "Like" and "similar" are synonymous terms, and the addition of the words "and conditions" does not add anything to the "circumstances," nor does it enlarge the scope of the inquiry. If "circumstances," by the intent of the Legislature, is limited to traffic circumstances, "conditions" has the same limitation as though the word "traffic" had been inserted, so that the sentence reads "under substantially similar traffic circumstances and conditions." We can, therefore, treat the acts in that particular as substantially alike.

The case of

The Great Western Railway Company vs. *Sutton*, 4 Appeal Cases (L. R.), 226,

decided in 1868, which preceded the Traffic Act of 1873, creating the English Railway Commission, arose in consequence of a charge by the railway company of a higher rate to one Sutton (who was what is called an intercepting carrier, that is, one who makes a business of collecting small parcels, packing them together and thus cutting into the express business of the railway company, as a small parcel carrier), than it charged to other traders for parcels having the like outward appearance. The railway company insisted upon being permitted to charge the higher rate because Sutton was taking part of its more profitable business away from it by packing the goods substantially like the goods shipped from merchants to merchants or from merchants to consumers. Justice Blackburn states

(p. 239) that the language, "goods of the like description and carried under like circumstances," applies to the *description of the goods and the circumstances of the carriage* and not to the trade of the consignor or consignee. On page 245 he further says that the circumstances must be those relating to the traffic, and that the fact that the plaintiff was a rival carrier does not in itself make a difference in the circumstances such as to justify a difference in the charge under the statute; it rather makes against the defendant as supplying a motive for the attempt to evade the statutory provisions.

And Justice Wills, in delivering the concurring opinion, says (p. 247), that "the goods were carried under like circumstances where the *route, risk and expense* are, in the opinion of the jury, the same, otherwise not."

Lord Chelmsford says (p. 260): "I felt greater difficulty in ascertaining the meaning of the words 'under the same' or under like circumstances; I do not see, however, that they can relate to anything else *than the conveyance of the goods.*"

In the case of

Thompson vs. *London & Northwestern Railway Co.*, 2 N. & M., 115,

the railway made a slight differential to compete with the Midland for the carrying of the goods of Truman & Co. and Cooper & Co., brewers, who were connected with the Midland Station, and who handled their own beer, and were, therefore, not charged at the Midland Railway any rate for cartage or terminal service. To equalize this element of competition the Northwestern Railway attempted to handle Truman & Co.'s and Cooper & Co.'s ales at the same rates that the Midland Company did. There was no intention to discriminate against any other brewer, but simply to reach out for the trade. The Commission held that that was a violation of the Act of 1854, and that in order to justify a difference being made by a

railway company in favor of one or more individual members of their general class of customers, there must be an adequate consideration to the railway company *lessening the cost to them of the service rendered* to such individual members of the general class, and it is not sufficient that the railway company merely desires to attract the traffic from another line to itself, especially where the favor thus shown to a few is prejudicial to many others in the same trade as the favored persons.

This decision was confirmatory of the principle that the difference of circumstances must be those relating to the traffic only.

In the case of

London & Northwestern Railroad Co.
v. *Evershed*, 3 Appeal Cases, 1029,

decided in 1878 in the House of Lords, the question came up squarely as to whether a railway company under the stress of competition could make a discriminating rate. In that case a common law action was brought to recover for overcharges. The contention was not that the rate charged to Evershed was unjust or too large, but that the Northwestern Company made a lower rate to certain brewers, in order to meet the rate charged by the Midland Company to brewers who were at the same place on the latter company's own line. The decision of the Lord Chancellor (Lord Cairns) is very short and pithy:

> * * * "It appears to me the question in cases like the present must always be simply this: Is the plaintiff in the action obliged to pay one sort of remuneration for services which the railway company performs for him, while the company performs the same services for other traders, either for less remuneration or for no remuneration at all? My Lords, in my opinion, undoubtedly the railway company is, and that indeed is not disputed, in the collecting, loading and delivering of goods, performing identically the same services for the plaintiff in this action as for the two other firms of brewers whose names have been referred to. Now, as a mat-

ter of policy and expediency, it may be well that the appellants have good reasons for treating those other firms in the way they do; it may be that if they do not do that these other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway, and not by the railway of the appellants. But with those considerations the plaintiff in the action has nothing whatever to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of--whether in fact in that way they will equalize their capacity for competing with other lines or not. The one right, to my mind, the clear and undoubted right of a public trader, is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest."

And Lord Blackburn in the same case says:

"The 90th section of the Railway Clauses Consolidation Act says, in what seems to me very clear terms, that 'all such tolls shall be at all times charged equally to all persons, and after the same rate, whether per ton, or otherwise, in respect of all passengers, and of all goods, or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances.' It may be very well that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a smaller quantity of goods; that would be a difference of circumstances. And many other cases may be pointed out in which the circumstances would not be the same.

But the argument here has been almost entirely this, that because the two firms of brewers who have been mentioned happen to be so situated as to the Midland Railway that they can

> get cheap carriage by the Midland Railway Company, and consequently will not go to the North Western Railway Company if the North Western Company charges them the ordinary rate, therefore, because there is that difference in the persons, the North Western Railway Company may reduce the price to them in order to tempt them to bring their traffic to that company. I quite agree that this is not done with any view of injuring, or intention to injure, Mr. Evershed. It is done with a view to coax some of the traffic, which would otherwise go upon the Midland Railway, to come to the North Western Railway. It may be (but I do not give any opinion as to that) that it would have been provident and proper on the part of the Legislature, in making the enactment, to say that there should be an exception in such cases, and that there might be a different rate given in order to coax and induce traffic to go by a different route from that by which it would otherwise have gone. However, whether that would have been a prudent and proper thing for the Legislature to say or not, it is not what the Legislature has said, and it is very likely that it was the intention of the Legislature not to say it, because it was thought that if equality of charge is to be disregarded under *any* circumstances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all."

In that case, precisely as here at bar in this case, the argument of the railway company was that neither Evershed nor any other brewer was injured by the lower competitive rate made to a brewer situated more advantageously to the London market. That the latter's product would reach London *via* the Midland Railway in any event at lower prices than the Evershed product (just as it is claimed that

the English product will, in any event, by the Cape or Isthmus route reach San Francisco at lower cost of freight than the New Orleans product), and that the only effect of the decision against the Northwestern Railway Company would be to deprive the road complained against of the ability to participate in the business. But all this sophistry in view of the direct mandate of the statute was brushed aside.

In the *Evershed* case it was also held that under the Railway Clauses Act of 1845 and under the Act of 1854, a direct action for infringement of the provisions of the act and for the recovery of the over charge, together with damages, could be maintained. After a very careful re-examination, however, of the provisions of the Act of 1854, the Court of Appeal, in the case of

> *Phipps* vs. *London and Northwestern Railway Company*, 2 Q. B., 229,

on the authority of the case of

> *Denaby Main Colliery Company* vs. *Manchester, Sheffield and Lincolnshire Railway Company*, 11 Appeal Cases, 97,

came to the conclusion that no such action would directly lie for the recovery of damages by a jury for non-performance of the duties imposed by the railway traffic acts, but that in the wisdom of Parliament the railway companies and the public had been made subject to the authurity of a special tribunal for the consideration of those questions, and that the injunctive and mandatory power of that tribunal was the proper remedy to be applied.

Therefore, only in the particular of allowing this class of cases to come before a jury, and not as to the principles of law enunciated by the Court or the interpretation of the statute, have the *Sutton* case and the *Evershed* case ceased to be authorities. There never has been a denial of the principle enunciated, and the *Evershed* case stands, even to-day, as an authority as to the right of an action before a

jury under the provisions of the Act of 1845, which did not create a tribunal, although it has been overruled as to the right of an action under the Act of 1854, which did create such a tribunal.

The *Evershed* case was followed in the *Budd* case (4 Railway & Canal Traffic Cases, 393, N. & M.), as to a right of a common law action for damages for breach of the provisions of the Railway and Canal Traffic Act of 1854).

The case of the *Denaby Main Colliery Company* vs. *The Manchester, Sheffield and Lincolnshire Railway Company*, decided in the House of Lords in 1885, was a very peculiar one. A rebate of 8s. 6d. per ton was made respectively on coal carried to Grimsby to certain coal merchants for export in the one case to the West Indies and in the other case to Hamburg. These coal merchants also had business in Hull and Goole. They were likewise shipping merchants, and the Manchester, Sheffield and Lincolnshire Railway Company had to enter into competition with other railways and sea carriers to get the business of these merchants, by the rebate in question. It appears that the Hamburg and American Steamshipping Company had a line of steamers to the West Indies; that they were in the habit of using Welch coal, and that by making the rebate in question it was hoped to induce this steamship company to stop at Grimsby to coal. There was also a complaint that the railway company had established a uniform rate for a group of collieries situated at different points along the line which was to the detriment of the Denaby Main Colliery Company, and ignored its geographical advantage. The controversy came up on the statement of a special case prepared by Mr. Wills, Q. C., as Referee, before he became a Judge. The Court held that, inasmuch as all the goods were not carried over the same portion of the line, a recovery could not be had under the Act of 1845, as was allowed in the *Sutton* and *Evershed* cases; and that, inasmuch as Section 2 of the Act of 1854 provided a remedy by injunction or

interdict, no direct recovery could be had as to so much of the goods as did not pass over the same line and in the same direction, and in that respect overruled the *Budd* case and so much of the dicta in the *Evershed* case as seemed to allow direct action for damages to lie for infractions of Section 2 of the Act of 1854; but it did allow a recovery of a certain portion of the damages that had been claimed, because the coal was carried over the same portion of the line as the coal carried for complainant, at a different rate, in defiance of the Act of 1845. In considering the questions involved, beyond the mere right to a monetary recovery, before a jury, Lord Blackburn says, with reference to the judgment of the Court of Appeal:

> "But I am unable to agree in their judgment as to the coal carried from the appellants' colliery to Grimsby and there shipped on the American steamers, and the coal carried from the same colliery to Grimsby and shipped to ports south of Harwich. I do not think that a desire, however *bona fide*, to foster a new trade can justify making a difference of charge on coal passing only over the same portion of the line of railway under the same circumstances. And I do not think that it makes any difference in the circumstances, where coals are delivered at Grimsby for shipment that one parcel is shipped on a vessel bound for one port and another parcel on a vessel bound for another."

The Court further held that a direct action would lie for an overcharge to the mining company on so much of the coal delivered to the coal merchants' shipping agents, Bannister and Josse & Co., as was used by those agents locally at Grimsby, or rather for the recovery of the difference between the charge made to Bannister and the charge made to the mining company; and the case was remitted to the arbitrator for final adjudication.

The authority of the *Budd* case was, as above stated, overruled in the *Denaby* case, leaving un-

touched the authority of the *Evershed* case as to this definition, Lord Herschell saying:

> "The case of Evershed, which was supposed to be an authority, cannot now, in the light of the decision in the Denaby Main Colliery Company, 11 Appeal Cases, 97, be regarded as an authority *on that point.*" (On the point of the right to maintain an action at common law for damages for breach of the provisions of the Act of 1854.) "In Evershed's case, 3 Q. B. D., 134, no doubt, in the argument in the Court of Appeal, both the equality section and the undue preference section were alluded to, as they were in a judgment to which I will call attention in a moment; but the equality section clearly applied in that case, because all the goods were carried only over the same piece of line; and, therefore, on that ground the House of Lords affirmed the judgment in Evershed's case, 3 Appeal Cases, 1029; but, in the view of the House of Lords, in the subsequent case of the Denaby Main Colliery Co., 11 Appeal Cases, 97, it was only on that ground that they affirmed it, and not with any reference to the second section to the Act of 1854, inasmuch as in the subsequent case the House of Lords held that no such action as was brought in Evershed's Case, 2 Q. B. D., 254, would have lain in respect of any charge of undue preference under the Act of 1854. Therefore, Evershed's Case, 2 Q. B. D., 254, as an authority *upon this point* is gone. No doubt, when you are dealing with the Railways Clauses Consolidation Act, 1845, as Lord Blackburn points out in his judgment in Evershed's Case, 3 App. Cas., 1037, 1038, the words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute. Lord Blackburn said it might have been very reasonable even in that case to allow other considerations to weigh, but that the Legislature had not done so."

Therefore, the authority of the *Evershed* case stands as a judgment under the Act of 1845, and the

grounds upon which the Law Lords base their judgment are reaffirmed and not doubted by the Court in the *Phipps* case.

Now let us further analyze this *Phipps* case, for the purpose of determining its exact meaning. The Phipps case arose under Section 27 of the Act of 1888. Under the decisions theretofore made in the Evershed and other cases the "considerations" to which the Court gave weight under the language of the English Act were traffic considerations only. By Section 27 of the Act of 1888, the scope of the meaning of "like circumstances" was enlarged specifically by statute, by adding, in terms, to the circumstances which the Court may take into consideration, other circumstances than those of traffic conditions, in language as follows:

> "In deciding whether the lower charge or difference in treatment amount to an undue preference, the courts or commissioners may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for securing in the interest of the public the traffic in respect to which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant."

By section 29, the railroad company is empowered to group together any number of places, in the same district situated at various distances from any point of destination or departure, charging an uniform rate therefor, provided that the distances are not unreasonable and no undue preference is created thereby.

After the passage of the Act of 1888, which included these sections, Phipps asked the railway commissioners for an order to enjoin the London and Northwestern Railway Company from giving what he claimed to be an undue and unreasonable preference or advantage to the owners of iron furnaces at Butlins and Islip, in the carriage of pig iron to the South Staffordshire

markets. The undue preference that was complained of was as follows: Dustin was 60 miles from a distributing point known as Great Bridge; Butlins and Islip had the advantage of two railways instead of one—the London and Northwestern which served Dustin; Butlins was 71 miles and Islip 82 miles from Great Bridge; the iron founders of Dustin, of which Phipps was one, had their iron carried at 5s. 2d. a ton to Great Bridge, whilst Butlins and Islip furnaces, having competitive railways, were charged 5s. 8d. per ton, and although Phipps was receiving the advantage of a 6d. per ton on the aggregate charge, he complained that a sufficient difference, taking into consideration the rate per ton per mile, was not made in his favor, and that, therefore, there was an undue preference against him by not giving him the full advantage of his geographical situation. The Northwestern Railway Company, thus summoned before the Railway Commission, justified itself under the provisions of the Act of 1888, which in terms permitted the Commission, in determining questions of discrimination, to take into consideration competitive circumstances and considerations actuating the company in its desire to acquire business, in addition to traffic conditions. The Commissioners took those matters into consideration, and dismissed the complaint, stating that under the law as it then stood there was no undue preference.

The statute of 1888 had also taken away the power of appeal to the higher courts on findings of facts by the Commissioners, limiting the appeals to the higher courts only to questions of law. The question of law that was raised by the Phipps case, both in the Court of Appeal and in the House of Lords, was that the Commissioners erred in taking into consideration anything but the traffic conditions in making up their judgment, and the Commission was sustained both in the Court of Appeal and in the House of Lords on the ground solely that they were permitted specifically by

the statute of 1888, Sec. 27, indeed, almost directed, to take into consideration conditions other than those of cost of traffic, *i. e.*, competitive conditions, in determining whether or not there was an undue preference; and, therefore, the higher court (50 Am. & Eng. Ry. Cas., 494), held that there was no error in taking into consideration competitive conditions which did not reduce the charge to the complainant below the price that was charged to him at the shorter point, but still gave him an advantage of six pence per ton by reason of his closer proximity to market.

And the highest courts carefully guarded in their decision against inference being drawn that an unlimited warrant for difference of rates would be justified or excused by competition, or that even the Commissioners or the courts are to give to such a consideration anything but a reasonable and limited exercise, which would not create any undue preference or a destructive inequality. This is shown by the careful language of Lord Herschell, who delivered the main opinion in the case, saying:

> "Therefore, it seems to me that, whether you look at the Act of 1854 by itself, or whether you look at it in connection with the provisions of sub-Section 2 of Section 27 of the Act of 1888, to which I have been referring, it is impossible to say that there is anything in point of law which compels the tribunal to exclude from consideration this question of competing routes. I do not go further than that. It is not necessary to go further than that. I am not for a moment suggesting to what extent it is to weigh. I am not suggesting that there may not be such an excessive difference in charge made in cases of competition, as that it would be unreasonable and unfair when you are looking at the position of the one trader as compared with the other. That may be so, but all that is matter for the tribunal to take into account, and, certainly, I think that they are entitled to take it into account, and to give weight to it as far as is reasonable. If that be so, it is, of course, sufficient to dispose of the present case."

We cannot extend the authority of this case beyond these carefully guarded words of Lord Herschell, even as applied to the enlarging language of the statute of 1888. The only question for the House of Lords, or for any court to decide, in that case was whether it was error for the Commission to take into consideration, in any way, the competitive question; and if they could take it into consideration at all, the questions of fact found on taking the matter of competition into consideration were not appealable, and, therefore, there was no error of law. Hence Lord Herschell says that if the Commission can take competition into consideration at all, then its conclusion of fact, after taking into consideration that the Railway Company by its action did not create an undue preference, was one which was not appealable to a higher court.

In this same case, in examining the case of Budd *v.* The London and Northwestern Railway Company, Lord Herschell says that the attempt to justify the charge in that case was the competition of sea carriage, and that that competition could not be invoked as an excuse for making a higher charge for a longer distance, all traffic conditions of the railway being equal. He also says as to the facts developed in the Budd case:

> (p. 507) "It may be doubted whether, even if competition could be properly taken into account, the action of the defendants there was capable of justification, because the charge made was actually smaller" (for the longer distance) "than the charge made to the plaintiff" (for the shorter distance). "Now, inasmuch as they have carried, not only from a point beyond that from which they carried the plaintiff's goods, but carried the goods of these other traders over exactly that piece of line over which they carried for the plaintiff, and yet made a smaller charge, it may have been difficult to say that the equality clause– that is to say, the 90th Section of the Railway Clauses Consolidation Act of 1845—was not infringed. But, however that may be, there is no doubt

> that the Chief Baron did express a strong opinion that it was a breach of Section 2 of the Railway and Canal Traffic Act, 1854, because he said the question turned on the construction of that section. I am unable to agree in the view of the learned Judge, if it involves the proposition that competition cannot be taken into account at all, although it may be that in that case the difference of treatment was such as, even taking competition into account and allowing for it, it could not be justified."

Lord Herschell, therefore, holds in the Phipps case that, though competition may be taken into account under the Act of 1888, that competition must not be so taken into account solely in the interest of the necessities of a railway company, without taking also into consideration the question whether that competitive condition does not create an unfair and undue preference. And if it does so, even under the Act of 1888, competition would not justify the creation of such oppressive and unfair preferences.

The last English case I have been able to find, and one of great interest in this controversy, is that of

> *The Liverpool Corn Traders' Association* vs. *The London & North Western R. R. Co.*, 7 *B. M.*, 125,

decided November 14, 1890. The question there was whether the charge of undue preference may be answered by the Railway Company by its desire or necessity to secure the traffic, and it came up under all the English acts much more directly than it did in the *Phipps* case, where the only question presented was whether the Commission had erred in taking the competitive question into consideration under the Act of 1888.

The action was brought by the Liverpool Corn Traders' Association to prevent the London and Northwestern Railway Company from charging 11s. 3d. on grain and flour of like weight and packages, from Liverpool to Birmingham, a distance of

98½ miles, as compared with 8s. 4d. from Cardiff to Birmingham, a distance of 173 miles. The answer by the Railway Company was that the rates from Liverpool to Birmingham were fair and reasonable. (The answer that is made by the Railway Company here is that the rate from New Orleans to San Francisco is a reasonable rate.) That the rates from Cardiff are governed by the rates from Bristol to the Severn ports by the Severn, the navigation of which is free; that if they were materially raised, the traffic either would not be sent at all, or would be carried *via* the Severn. That case, therefore, bears a very close analogy to the case at bar, in which the Texas and Pacific Company says that if they should raise the rates for goods that came from Liverpool for San Francisco they would not participate in carrying the traffic—it would go *via* the Cape or Isthmus. The Railway Company in the English case said that the lower charge was necessary for the purpose of securing, "in the interests of the public," the traffic in respect of which it is made, and the inequality could not be removed without unduly reducing the rate charged from Liverpool.

There, as here, the contention was that the Liverpool traders were not injured by reason of the Cardiff competition because between the Severn ports and Bristol Channel ports, and Birmingham, there was the competition of water carriage, and that Cardiff goods would go to Birmingham at the lower rate even if the Northwestern Company was driven out of the business. To this contention the Court answered that:

> "It is enough, I think, to warrant the application" (for injunction) "and to call upon the Court for its interference, if the practices complained of—whether their present effect be serious or trivial—are in themselves legally objectionable, and if they may lead to consequences injurious to the interests of those represented by the applicants. In the present instance I am satisfied that the traffic in grain, &c., from Cardiff to Birmingham taken by itself is not large

enough to make any appreciable difference to the Liverpool traders, and further, that a far more serious element in the competition from which they suffer is traffic from the Severn points. Such traffic is partly by water, and the applicants cannot touch the rates applicable to it, partly by railway under rates as to which no suggestion has been made that they are improper, or afford ground of complaint against any of the companies. But no one can say to what extent a traffic by railway from Cardiff, fostered by the low rates complained of, may not grow in time."

The Court then concedes that it is difficult for Liverpool to hold its own in the Birmingham market, taking into consideration the water traffic from Cardiff as to corn, and that there is a formidable competition from the Severn ports aided by a great many low rates over which no Court has any jurisdiction; but, says the Court:

"There is no doubt that the defendants carry from Liverpool and Cardiff to Birmingham, and that the Legislature has said to both railway and canal companies 'If you do enjoy the advantage of serving two places, however far apart, *you* must not sacrifice the one set of local interests to the others by undue inequalities in the rates, and so far as *your* contribution to the circumstances under which trades in competing districts are to be carried on are concerned, you must be fairly neutral between them, or if you are not, you must justify the departure upon grounds legally valid.'"

And the Court concludes on that part of the case:

"But there is no doubt that in this case the rates are unequal to an extent for which—as a question of amount merely—little or nothing could be said if the Cardiff traffic bore any considerable proportion to the Liverpool traffic."

The second branch of the case compelled the consideration of a question strictly analogous to the one at bar, whether the rates challenged were fixed

by the necessity of competition with the other means of communication, not so much through Cardiff as through the other Bristol Channel or Severn ports to Birmingham, and whether this circumstance justified the low rate from Cardiff. The Court, after making a careful examination of Section 27 of the Act of 1888, and complaining somewhat that too much was put upon the Court which might have been regulated by the Legislature, insisted that but for the language of the Act of 1888, there would be no question left to decide, as clearly under the older acts the preference to Cardiff and the undue discrimination against Liverpool would be absolutely unjustifiable; and the Court, further conceding that the preference was made to Cardiff not for the purpose of giving the preference, but to secure the traffic, says:

> (P. 136.) "That, however, cannot be a justification of itself, otherwise there would be no occasion whatever for providing, as the section certainly has done, that something which necessarily includes this particular head of justification, but requires also a great deal more in order to satisfy the words used, should be capable of being treated as an element merely of justification. There is no other circumstance that has been pointed out, or can be pointed out, tending to justify it, whilst mileage, route, necessity of sharing the rates with other companies, are all against the low rate."

The Court thereupon discusses the question, what is the public interest, and is it a public interest that the railway company should participate in Cardiff business? It answers this negatively, and says:

> (P. 138.) "It is, as a broad general rule, against the public interests that artificial circumstances, which at the will or caprice, or for the self-interest of any one man or body of men, might be swept out of existence, as lightly as they were perhaps created, should be permitted to interfere with the natural course of trade. These considerations appear to me to be weighty ones, and to afford broad and safe grounds for

> saying that it is not necessary in the present case to secure in the interests of the public the Cardiff traffic in question. On the other hand, no circumstance has been brought to our notice in the course of the present discussion to indicate that any important public interests will be affected if the traffic in grain, flour, and the like goods by rail from Cardiff to Birmingham should by reason of any decision be lost to the railway companies, and have to go by some other route. It is certainly a remarkable fact that no single trader from Cardiff has been called to say a word in support of the rates in question, or to point out the public interests involved."

And the Court enjoined the continued charging of the lower rate to Cardiff traders with Birmingham, as compared with Liverpool traders.

Now, this case exactly fits our own position. The English courts, although specially required by the Act of 1888, unlike our own courts, to take into consideration all the circumstances (including competition) which go to determine the fixing of a rate, in substance say that competition may lower the rate per ton per mile, but it must not wipe out all the advantages of proximity to the market, and it is an unreasonable and unfair preference to place the more distant market, even under the pressure of competition, in a more favorable position than the nearer, and that even in cases where the companies serve both the nearer and the more distant market.

In the case at bar—unlike the *London and Northwestern Ry. Company* case—the Texas and Pacific Company can in no sense be said to serve the Liverpool or Southampton market; these are foreigners to the territory and foreigners to the corporate rights of the Texas and Pacific Railway Company. It is under no obligation to take that traffic or to deal with it in any sense. It is a mere volunteer reaching out for traffic which does not belong to it except in the sense that its acquisition may in-

crease its revenue, and for which acquisition it places at a serious disadvantage the community which has chartered its existence, given to it its corporate life, and which, it may be truly said, it ought primarily to serve.

In further illustration of the principles decided in the last case, see

Richardson v. *Midland Ry. Co.*, 4 Railway and Canal Traffic Cases, 1.

In conclusion let me draw the attention of the Court to the remarks made by Commissioner Miller in the case of

Rhymney Iron Company, Ltd., v. *Rhymney Ry. Co.*, 6 Railway and Canal Traffic Cases, 60,

a case which is in most particulars on all fours with the case at bar:

> (P. 76.) "But then an extremely ingenious and able argument, if I may take the liberty of saying so, has been adduced to us of this nature; 'let it be granted that we cannot show any advantage arising from the incidents of this particular traffic itself, as compared with the incidents of any other portion of similar traffic on the line, still we show coming from one set of customers an enormous volume of traffic, which secures to us a steady occupation for our engines, carriages and porters; in fact, our line is kept steadily full, and we consider we are entitled to take that great volume of traffic, coming from this one set of customers, into account, and to give them more favourable terms than we give all the other customers which make up the balance of our traffic.' It appears to me that that is the very thing which the Act of 1854 was intended to forbid. A company would never, I assume for the credit of English business men, have given a preference to one customer over another merely from caprice or from any malicious intention towards the other customers. *It was always given because the company thought, rightly or wrongly, they could get some benefit to*

> *themselves by doing so.* But the very object of the Act of 1854 was to provide that it should not be given under circumstances which, in regard to the particular class of traffic concerned, were not in themselves reasonable; that is to say, that the reasonableness of the thing should arise out of the incidents of the particular class of traffic concerned, and that I take to be intended by the words 'any particular class of traffic' used in that second section of that Act of 1854."

The general conclusion to be drawn from these cases is that under the state of the law as it existed before the enactment of the Railway and Canal Traffic Act of 1888 in England, the Courts have held that the words "like circumstances" as used in the act related to circumstances confined to traffic; that competitive conditions, if considered at all, were permitted to be shown in order to prove that there was no animus or intent to discriminate against persons or localities, but that such competitive conditions would not be allowed to justify or excuse a discrimination against persons or localities; that the Act of 1888 enlarged the scope of the Commission and Courts, in view of the state of the former decisions, by permitting them to take into consideration competitive conditions; that such competitive conditions are not permitted, however, to weigh to the extent of justifying a larger charge for the shorter distance than for the longer distance over the same line; and also that the competitive conditions which are to be considered are confined to competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside such field.

The attention of the Court is drawn to the fact that no such enlargement of the scope of the inquiry or of vindication of the railway companies for justification of the lower charge for the longer distance as compared with the shorter has been made by any statutory enactment in this country similar to that which was made in 1888 in England, but that

in lieu thereof there was incorporated into our Interstate Commerce Act of 1887 a provision allowing the Commission, at the instance of the railway company, or at its own instance, to exempt carriers in special cases from the operation of the long and short haul clause of the act contained in the fourth section, and the grounds that might influence the Commission to make such exemption were left largely to the discretion of the Commission. It could, limited by the strict provisions of the act in the other sections, take into consideration the competitive conditions which surrounded the railway company, but even that consideration must be limited to competitive conditions within the field of occupation of the company's own legitimate business.

In answer to the lengthy argument of the defendant's counsel on the merits, I assert that, speaking generally, they seem to have two excuses for the discrimination shown to have been made in this case: First, that their compliance with the order of the Interstate Commerce Commission and with the law, would make the railway company lose the Liverpool and Southampton—Pacific coast traffic; in other words, that unless they are permitted to discriminate against the citizens of New Orleans and all American manufacturers by charging, say, for a case of American cutlery a through rate of $1.07 per hundred pounds from Liverpool to San Francisco, including the ocean freight, as against $3.70 per hundred pounds from New Orleans to San Francisco alone, or for a carload of carpets at $1.07 per cwt. from Liverpool to San Francisco, including the ocean freight, against $2.88 from New Orleans to San Francisco alone, or for a case of books at $1.07 per hundred pounds, from Liverpool to San Francisco, including ocean freight, as against $2.88 per hundred pounds for books from New Orleans to San Francisco alone, they would not move the foreign traffic to San Francisco via New Orleans; and secondly, that the act of the Texas and Pacific Rail-

way Company in assisting in the carriage of goods from Liverpool to San Francisco at one-third the rate for which it carries the like goods, under like circumstances and conditions, from New Orleans to San Francisco, is not the only cause which operates to exclude the American manufacturer or the local tradesman in New Orleans from competition with the English manufacturer in the San Francisco market, because, forsooth, if the railway from New Orleans were to go out of the business of such carriage, the same goods would in all probaability be laid down at San Francisco at a similar low charge for transportation, by sailing ships from Liverpool around Cape Horn to San Francisco, or by sail or steamships from Liverpool or Southampton to Aspinwall and there transshipped by rail to Panama, and from Panama again by ship to San Francisco; that, therefore, the American manufacturer or producer is, in any event, out of the market. But if this reasoning is correct, every importer at New Orleans, or even at the Atlantic seacoast, who purchases a quantity of articles from abroad, is placed at an undue disadvantage in attempting to sell them on the Pacific Coast, by reason of competition between the Texas and Pacific Railroad and the ship lines and railways outside of the jurisdiction of the United States, and not to be reached by our legislation.

The answer to the first proposition that it is necessary for the railway company to infringe and violate the law in order that it may make a profit, is, that this proposition is one which a court created to enforce the law has no right to consider either as an excuse or palliation. All police laws and health laws could be set aside on the ground that their observance inures to the disadvantage or detriment of a part of the community, and even at times to entirely useful and proper classes of the community. The consideration that the observance of such a law would be a loss to the carrier is one which must address itself to the legislative branch of the country

alone, as to whether there should or should not be an amendment to the law in that particular, so as to justify that which is otherwise illegal. The courts can give no consideration or countenance to such an excuse for the violation of the law.

In 1879, I carried on as counsel to the Hepburn Railway Committee of the New York State Assembly, and as representing the Chamber of Commerce and Board of Trade, an investigation of railway abuses as they then existed in the State of New York. The testimony and report of that Committee will no doubt be found in the Congressional library. It was shown to that investigating committee, that in consequence of a railroad war, which was then being carried on, the rate of freight on flour went down to 10 cents a hundred pounds from Minneapolis to New York, whilst the rate from Rochester, Niagara and Black Rock (milling centres) remained far in excess of that sum; and although the New York miller was as effectually put out of the business of milling and supplying the market of New York City as though the torch of an incendiary had burned down his mill, it was, nevertheless, claimed there, as here, by the railway corporations of the State of New York, that the victim had no reason to complain of the New York railway companies in making such rates, because forbidding them, by New York Statute, to make rates of that character would not benefit the New York miller so long as the Pennsylvania Railroad Company or the Baltimore and Ohio Railroad Company could, by their tariffs—and they were not subject to the jurisdiction of the State of New York—lay down the flour at Jersey City, opposite New York, at the ten cent rate. The answer made by New York State was that that might be true, but that it had a right to protect its natural children from being injured by its artificial children—the railway corporations chartered by the State—even if it could not protect them from being devoured by alien artificial children. The same answer holds good here. We can prevent, under the Interstate

Commerce Act, railways that carry interstate traffic either from New Orleans to San Francisco or from New York to San Francisco, from committing an act of discrimination so unjust and so gross as manifestly to drive out of business all but the English competitors for the San Francisco traffic, even if such act cannot wholly prevent injury from being done to our citizens by other and alien corporations who do not, in consideration of bearing the burdens of our laws, receive also their benefits. It is not even true, however, that the defendant would have to go out of the business of carrying the classes of merchandise mentioned on page 132 of the Record, from New Orleans to San Francisco. The Court will take notice of the fact that the only routes suggested by which the same traffic can go to San Francisco from England is by sailing vessels around Cape Horn, involving a trip of between four and five months, from the ports of England, and another route involving two transshipments at least, if not three, from steamship to rail and from rail to steamship, *via* the Isthmus of Panama – another extremely roundabout way of transportation.

The answer of the defendant, that it must do injustice to live, is very much the same as that of a French culprit in the last century who, when charged with stealing, replied: "I must live." He was met with the rejoinder from the French Judge that there was no such necessity, and was ordered to execution. As to the second position taken by the defendant, it is very much as though a person charged with highway robbery claimed as an excuse for his performance that he found the man on a dangerous road, which was infested with highwaymen, and that the victim had no reason to complain of the robbery by himself because he would inevitably have met the same fate at the hands of some one else possibly not so humanely inclined to refrain from taking the life as well as the property of the victim.

Our answer to both of these propositions is the language of the statute, which forbids the doing of this injustice to the American producer, and per-

mits of no excuse on the ground that the doing of the thing forbidden by the statute is profitable to the railway, or on the ground that the victim of the injustice would not ultimately be benefitted by the observance of the law on the part of the railway company.

The excuses of the company for the discrimination practiced in this case is based on mere sophistry. The Texas and Pacific Railway Company, in combination with the Southern Pacific Railway Company and a European transporter, places European goods in the San Francisco market at from one-half to one-third the rate that it charges under like circumstances and conditions of transportation, to the American producer and merchant. This is, on its face, so disastrous a discrimination against the citizens of the United States, that it drives them out of competition with the European producer on the Pacific coast. The injury is done by the American railway in defiance of the clear prohibition of the Interstate Commerce Act, and the clear prohibition of the common law, were there no Interstate Commerce Act. That other instrumentalities, not subject to our law, contribute towards the same injury, does not lessen the injury done by the American railway to the American producer, nor afford any excuse to a railway company chartered by a State of the American Union, or by Federal statutes, receiving advantages under the laws of the State and Nation, enjoying the right of eminent domain, and exercising its powers, under the protection, and, therefore, subject to the control of the Federal law.

It is our duty to prevent this infraction of the law and the continuance of this wrong to the American citizen, quite independently of whether or not we can prevent the further or additional wrong which

is done by European water lines. It is also obvious that transportation service is made with greater dispatch and greater safety by the steamer lines from Liverpool and Southampton to New Orleans, and thence by a single transshipment across the narrowest part of the United States to San Francisco, than by the other routes which are claimed to be rival lines, and that, therefore, the wrong done by the defendant is really by far the most serious. A man is none the less depleted of his property, and his complaint against any one of the evildoers who wrongfully deprives him of his own, is none the less just because he is attacked by three people and the division of the spoils is made between these three people. In the eye of the law, and as a fact, each wrongdoer is treated as though he were the sole wrongdoer, and no man is permitted to excuse himself for his own wrong on the ground that if he had not participated in the offense, the other two would nevertheless have been powerful enough to commit the spoliation.

Even England, with all its free trade tendencies and practices, allowing, with reference to all raw material and manufactured goods (with the exception of about twelve articles, and those not produced in England) almost entire and absolute freedom of competition by the foreigner, has expressly said to its railways by its Statute of 1888: "You shall not put the foreigner, by your railway rates, in a better position than you do the home producer and the home trader." And there, in England, the difficulty of the home producer and the home trader is vastly more intensified by the cheap rates from abroad and by the competition of ocean-going vessels, because England is a small island, indented on all sides by harbors, on which great cities are placed, and navigable rivers and canals which

reach the leading cities. The English railway is placed under a water competition from all the world vastly greater than is encountered by any American railway, but even in that country no such excuse as loss of traffic or the inevitable competition which, if the company surrenders the traffic, the English producer must, nevertheless, meet from goods shipped under the lower rates made by foreign railway and ship lines, was permitted to avail, and the Parliamentary Commission of 1888 recommended, in express terms, the stoppage of the practice by the railway, which recommendation the English Parliament immediately followed by expressly enacting a law (Section 27 of the Statute of 1888) forbidding in the future any discrimination between foreign products and English products to the detriment of the English producer and trader. This as before shown has already been accomplished.

If the company may consider the difference as to the origin of the traffic as a reason for making a discrimination between like traffic going over the same line from New Orleans to San Francisco under precisely similar circumstances and conditions of traffic movement as to the railway, why may they not consider, then, as a rightful cause of discrimination between two manufacturers at New Orleans, the difference between the advantages of the one as against the disadvantages of the other in manufacturing the same article to be transported to the San Francisco market, its point of consumption?

A has secured for his factory natural advantages of situation by reason, perhaps, of water-power. He has also large capital, intelligence, industry and shrewdness. *B* has an unfavor-

able position, no natural advantages, a badly planned factory, inadequate capital and antiquated methods. The market of both for the consumption of their product is San Francisco. Their factories are both at New Orleans. May the railway company, because the circumstances of production are different, carry the goods of *B* at half the price at which the goods of *A* are carried? Clearly not.

If similar conditions and circumstances are not confined to similar conditions and circumstances under which the traffic moves—that is to say, in train loads instead of car loads, car loads instead of single packages, classifications and rates of speed, &c., conditions and circumstances affecting the railway and not the origin of the traffic—there is no limitation to the discriminations and preferences which may be exercised by the railway company, and the second, third and fourth sections of the Interstate Commerce Act become idle words. "Similar circumstances and conditions" must mean circumstances of traffic arrangements and conditions of expense and cost to the railway to move the traffic —whether it be quick freight or slow freight, whether it moves in train loads or car loads. If this designation be not confined to the traffic itself, but

it is left open to the railways to consider and determine whence the freight comes and how it is produced and to charge different rates upon two cases of books moving from New Orleans to San Francisco, carried under like conditions and circumstances, or two car loads of carpets moving between the same points and drawn by the same locomotive, then all the provisions of the act requiring just and equal treatment of shippers become entirely nugatory.

We desire to draw attention to the fact that what is complained of here is not the higher charge for a shorter haul going over the same line of railroad, but that, under the plea of competition a lower charge is made for goods imported at New Orleans from some European port and carried from the eastern terminal of the Texas and Pacific Railroad Company in New Orleans to a place beyond its own terminal in the West, *i. e.*, the terminal of another line at the Pacific Ocean, than is made for goods shipped from New Orleans or some other domestic point by way of New Orleans, though the former are of like character to the latter and are carried under the same circumstances and conditions from the same initial point of the traffic so far as the railway is concerned. The traffic which originates at New Orleans and terminates at San Francisco thus placed at a disadvantage can in no sense be regarded as local traffic. It is in every sense through traffic. The difference is made upon the ground only that the one class of goods comes from certain places across the water and that the other class of goods comes from either New Orleans or other points in the United States to New Orleans, to be transshipped there.

On the argument of this case during the last term, by Judge Dillon, great stress was laid upon the influence of a decision of this Court in favor of the appellees upon the through bill of lading. He said it would kill the through bill of lading. It is always a serious and appalling

thing if the effect of any action is to kill. The seriousness of the charge, however, lies wholly in the imagination of the counsel. Of course, if no freight is moved *via* the Texas and Pacific Railroad from England to San Francisco, the through bill of lading which would accompany the freight that would otherwise go by that railroad is not born, and, therefore, cannot be killed. If, notwithstanding the fact that the Texas and Pacific Railroad Company is required to make no discrimination between home and foreign products going over its line, in favor of the product which comes from Europe, the goods are moved *via* the Texas and Pacific Railroad from Europe, there being added to the ocean freight rate from Southampton or Liverpool to New Orleans, the regular tariff rate of the Texas and Pacific and Southern Pacific Railroad from New Orleans to San Francisco, then the through bill of lading will accommodate itself to that rate precisely as it does to the present rate. Therefore, in no sense can it be said that the decision of this court in any way injuriously affects one of the instruments of commerce—the through bill of lading.

Down to 1888 it was perhaps possible to get, *via* steamer from New York to Liverpool and over an English railway to London, a through bill of lading from New York, for grain or animal products at a rate less than the combined freight rates of steamships to Liverpool added to the rate from Liverpool to London; but since the enactment of the Railway and Canal Traffic Act of 1888, forbidding that practice absolutely, the through bill of lading has not been killed from New York; it has only accommodated itself to the changed condition of the law, and goes at a little higher rate than it did before, so as to prevent the discrimination against the English products which English railways had at times made, and which caused the complaint and mischiefs that were met by the English statute. The fear, then, that the through bill of lading will be assassinated by the

application of sound regulative governmental principles of transportation to the facts in this case, rests wholly in the imagination of the counsel who presents the railway point of view.

As a matter of fact, one of the very evils, to prevent which the Interstate Commerce Act was passed, was the discrimination against home and in favor of foreign producers growing out of special rates on merchandise shipped on through bills of lading to interior points of the United States from a European seaport. That this was one of the chief causes of the complaints made against railways, is shown by the report of the Hepburn Investigating Committee of the New York State Assembly, which found,

> "The charge that the railroads of this State (New York) discriminate against the citizens of the State, and in favor of Western and *foreign producers*, is fully proven by the evidence taken" (Vol. 1, p. 48).

thereby arraigning the practice of the railways in making discriminations by means of the export through bill of lading as well as by means of the import through bill of lading.

As a result of this report, the New York State Legislature enacted a statute intended to counteract, within the limits of the State, the evils spoken of by this Committee. This investigation drew marked attention to this subject through the United States, in consequence of its being the most thorough examination into railroad abuses that had ever been made in this country, laid the foundation for the agitation of the subject in Congress, and finally induced the action of Congress in passing the Interstate Commerce Act.

Light is sometimes thrown upon an important question of this character by looking at the consequences of the Court's decision one way or the other, and such consideration, particularly in the

interpretation of statutory enactments, also throws some light upon the meaning and intent of the Legislature. If the decision is favorable to the contention made by the Interstate Commerce Commission, it may result in a loss of some business to the American railway, appellant herein, as to that part of the traffic with reference to which it chooses, voluntarily, to enter into an unnatural competition with foreign steamship or sailing vessels going to the west coast of America. On the other hand, such decision will enhance the value of the company's other traffic, by the maintenance of rates, and lay down an intelligible rule that the circumstances and conditions which justify differences of rates must be those relating to the traffic, and not those relating to persons or markets.

If, on the contrary, the great support of the Supreme Court of the United States is given to the contention advanced by the railway company in this case, and similar circumstances and conditions are held to be dissimilar with every change in competitive condition of markets, persons, regions of production or of rates of foreign steamship lines or sailing vessels whose tariffs, if they have any, are secret and are not under any control whatever from our or any other government, then the purposes of the act are nullified, the railway companies, themselves, are subjected—greatly to their own detriment—to all the old rate cuttings and railway wars which aroused so much just complaint, and the whole community is subjected to all the fluctuations, injuries and damages which result from the demoralization of railway rates, and the destructive, personal and local discriminations entailed thereby. In the great majority of instances in which complaint could properly be made, we should, practically, be remitted to a condition similiar to that which would have prevailed had the Interstate Commerce Act not been enacted, and the operation of the act would be restricted to a very small and insignificant compass indeed. This, it seems to

me, would be a national misfortune, and a misfortune from which, perhaps, the greatest sufferers would be the railway companies themselves.

III.

There is no justification in English law, and no justification can be found in American law, for a discrimination between goods like in character and quantity going from one terminal of a railway to its other terminal, on the ground that there is a competition of markets for the business of one of the terminals.

An examination of the American cases shows that since the passage of the Interstate Commerce Law the railway companies might, instead of appealing to the Commission for relief, under the fourth section of the act, plead the competition—*within their own field*—of water routes, and if the Commission found the facts sustaining the plea it would then determine as a matter of law whether the lower charge for the larger distance was or was not under the fourth section of the act an unlawful discrimination. And the Commission did not insist that such difference could not be made without a previous application to it for immunity from the long and short haul clause. It regarded the defense or answer as the equivalent of an application for relief from the fourth section of the act, and gave judgment accordingly. If in its opinion the competition did not justify the difference in charge, it held against the railway company; if the competition did justify the difference, it decided in the company's favor, notwithstanding the failure to make application for immunity.

There are, therefore, some decisions of the Inter-

state Commerce Commission which (unless it be remembered that they arise under the fourth section of the act, which section makes competition an element to be considered by the Commission in a particular case or class of cases) would seem to imply that under the second and third sections such competition is equally to be considered as justification. This is a mistake, as a careful examination of the facts of the case apart from loose expressions in the opinion will clearly show. But with deeper study and closer familiarity with the questions involved, the Interstate Commerce Commission has more and more carefully guarded its language, even in the cases arising under the fourth section of the act, so that in this case, in the decision of which Judge Cooley took part, the Court held that the competition relied upon as a justification, was not competition in the real sense at all—not being a competition of carrying agencies covering the same field—but that it was a competition of markets, and that to consider this as a justification for discrimination would result in leaving all producers from the seaboard to any point in the interior at the mercy of the railway companies.

In all the cases cited by defendant's counsel as supporting the view that the existence of competition will justify a discrimination, it will be observed that the competition which, as the railway company claimed, forced it to make a discrimination in its rates, was a competition with some carrier, whether by rail or by water, the line of which bore some relation as a competitor from a given point to another given point within the same field of operation. In other words, the *field of competition* was the same, and rates were lowered on account of this competition, either between two points, both of which were touched by both competitors, or both of which were at least intermediate points on the respective routes of both competitors. Such cases are here in no way in point. It is not claimed here that there is any competition with the Texas and

Pacific Railroad Company between San Francisco and New Orleans for the carriage of merchandise imported at the latter port, nor is there any competition with said company for carriage to San Francisco, by any other carrier, the route of which touches New Orleans. The "competition" which, according to the claim of the defendant, makes its low through rate necessary, is a so-called competition with ocean sailing vessels starting from Southampton or other foreign port and reaching San Francisco by way of Cape Horn, or with steamship lines starting from Liverpool and connecting with railroads across the Isthmus of Panama. And the defendant practically alleges that in order to divert part of this traffic to New Orleans, so that it can carry it thence to San Francisco, a low through rate is made necessary.

But we have already shown that this lowering of rates in order to divert traffic which ordinarily and legitimately would go to another carrying agency, having a route in no way similar to that of defendant, not having the same starting point and reaching no point touched by defendant except its ultimate terminus, that this is not "competition" which can justify a discrimination in rates as being caused by a dissimilarity of circumstances and conditions. And the cases which have discussed the subject of competition in this connection have never even approached sustaining the defendant's contention.

In the case of

Re Louisville & Nashville R.R. Co., 1 Int. Com. Com. Rep., 31,

in which the views of the Commission on the question of competition were first announced, Chairman Cooley used some language which might, at first sight, be taken to mean that the existence of competition is sufficient excuse for discrimination. As a matter of fact, however, the decision clearly defines the cases in which alone competition will be a

justification, and leaves it an open question for determination on the facts of each particular case as it may arise, whether the existence of "*actual*" competition has been established.

When the Louisville and Nashville case was decided, too, the question of competition had not received much thought, and the different phases of the subject had never been considered. In that case, therefore, the general language employed must be taken as modified by subsequent decisions of the Commission. Even in the Louisville and Nashville case, however, Chairman Cooley was careful to confine himself to what he called "actual" competition; and the sense in which he used this term shows that it will not be stretched to cover a counterfeit and fictitious competition, such as relied upon by the defendant in this case. The decision states:

> "It was fairly shown before us that instances exist and may be found along the routes of petitioner's lines in the States of Kentucky, Tennessee, Georgia, Alabama, Mississippi and Louisiana, where the competition of waterways forces down the railroad rates below what it is possible to make them at non-competitive points and still maintain the roads with success or efficiency. The reason is that the carriers by water can perform the service at very much less cost than the carriers by land.
>
> The general fact is that railroad rates for the transportation of property must approximate closely those which are made *between the same points by steamer*, and the steamer rates are generally, if not invariably, much below what the railroads can afford to accept upon all their business. In such cases, if competition is maintained, more must be charged at interior points than can be obtained at the points of competition, and if the competitive rates are such as are productive of some gain, however slight, the non-competitive points are likely to receive indirect advantage therefrom, while the competitive points have the larger and more direct benefit, and are afforded a choice of agencies in transportation, whose rivalry may fairly be expected to keep the cost down to a minimum."

And again:

> "The question whether railroad competition with other railroads which are not subject to the control of this law can present a case of dissimilar circumstances and conditions, within the meaning of Section 4, may possibly be one of greater doubt. The classes of roads not thus subject, and whose competition might be severe, are the Canadian roads and roads which are entirely within the control of a single State. * * * Competition with Canadian roads may, it is believed, present a case of dissimilar circumstances and conditions. Whenever such roads compete with roads in the United States for business *between one part of our country and another*, a state of circumstances arises and exists as to such business which justifies American roads in meeting such competition by a corresponding reduction of rates, without regard to the fact that in so doing the rates between the terminals may be reduced below rates to and from intermediate places which are otherwise reasonable and just in themselves."

In its report to the House of Representatives when the Interstate Commerce bill was under discussion, the minority of the House Committee on Commerce, which opposed altogether the long and short haul clause, said:

> "Nor do the minority favor the provision prohibiting the greater charge for a shorter haul than for a longer haul, as it was shown to a satisfactory degree, as we think, in the hearing, *that where two competing points were connected by water as well as by rail*, it was impossible for the railroads to secure the traffic unless they made their rates as low as the water rates, and that whilst they might be able to do this on a portion of their traffic it would be destructive of their interests to reduce all their rates to those which were forced upon them between certain points by the competition of the water routes."

See *In re Louisville & Nashville Railroad Company*, above cited, at page 77.

This statement, coming from those who opposed altogether the long and short haul clause, of the kind of competition which would justify a greater charge for the shorter haul, shows that only competition in the same general field was considered as making the circumstances and conditions of carriage dissimilar.

In the case of

Boston & Albany R. Co. v. *Boston & Lowell R. Co.*, 1 Int. Com. Com. Rep., 160,

the Commission held:

> "It is not a case of dissimilar circumstances and conditions, which will support greater charges on shorter than on longer hauls where there is possible water competition, the real competition for the long haul being by railroad, nor where a railroad competing for the long haul traffic is long and circuitous, and in order to share the traffic is obliged, as against more direct and competing lines to lower its rates" (see report of this case in 31 Am. & Eng. R. R. Cas., 655).

In his opinion, Chairman Cooley says:

> "The main reliance of the defense, however, was upon a showing of the competition which defendants must meet in long haul traffic. It was shown that for traffic between Boston and the West there was actual or possible competition by steamers to Portland and thence over the Grand Trunk by steamers to Halifax, and thence over the Intercolonial by the Southeastern road to connect with the Canadian Pacific by the several trunk lines and by combinations of carriers requiring no special mention.
>
> The evidence, however, is entirely conclusive that the competition which is troublesome to the defendants is that of the trunk- lines." "* * * The defendants do not fear the competition of a route by Halifax, *or of any of the other circuitous routes that can be organized, and such lines do not constitute circumstances*

> *or conditions having any perceptible bearing on the present controversy.* The circumstances and conditions that must justify the greater charge on the shorter haul over the Central Vermont line must be such as spring from the trunk line competition."

The language above quoted shows what the claim of competition can cover, and that in principle it should be restricted to competition in the same general field. Even the case of *ex parte Kohler*, 31 Fed. Rep., 315, which has been considered as going further than any other in admitting competition to be an element creating dissimilarity of circumstances and conditions, seems to recognize this, and Judge Deady, writing the opinion, says (p. 321):

> "And as I have said in my judgment competition between the *termini* of a long haul is the most obvious and effective circumstance that justifies a railway in making a rate below what it might reasonably, and does charge where there is no competition. The places *between which* competition in transportation exists between water craft and railways, or even the latter, always will and must send and receive freight at lower rates than others not so favored."

In other words, there is here discussed the question of competition between carriers having routes bearing some perceptible relation to each other, and there is involved no question of an alleged competition between carriers having altogether different starting points and reaching a given terminus by altogether different routes.

Other cases bearing on this subject, decided by the United States Courts, are to a similar effect. As a matter of fact the alleged competition to which the defendant points as a justification, is not competition at all, and while it cannot be said that defendant should be deprived absolutely of the ability to share in the carriage of such imported traffic, yet, if it desires the same it must secure it without doing

injustice to American shippers of freight between New Orleans and San Francisco and without violating the provisions of the Interstate Commerce Act. What the defendant does in this case is to itself create the circumstances, upon the existence of which it afterwards seeks to ground its defense against the charge of unjust discrimination. It forces itself into a competition, which in the natural and ordinary course of events it would not have to meet, and then makes the existence of this competition its excuse. This it cannot do. See

Business Men's Association v. *Chicago, St. Paul, &c., R. Co.*, 2 Int. Com. Com. Rep., 52,

where it is held that:

> "If the carrier claims to act under the compulsion of circumstances and conditions of his own creation and connivance in the making of an exceptional rate, then these will not avail him."

In this case the Commission thoroughly considered the defendant's plea of the necessity forced upon it by competition and it must be taken to have had in view in this connection its previous decisions and the decisions of the United States Courts on the subject. Yet the Commission found that on all the facts the defendant's contention was without basis and its decision distinctly holds that in no way does the alleged competition relied upon by defendant justify its disobedience of the provisions of the act; that these provisions clearly prohibit discrimination against American shippers of freight from a port of entry in the United States to a place of destination in the United States in favor of traffic originating in a foreign country and carried from a port of entry to a place of destination in the United States upon a through bill of lading (see Record, pp. 104 and 105). That this is true must be evident upon a reading of the terms of the act.

Even if it is true, then, that the existence of

actual competition is sufficient to make the circumstances and conditions dissimilar—a proposition which does not aid the defendant company, inasmuch as that company has not shown the existence of any real competition—it has yet never been disputed, and will not now be denied that the commission is, in the first instance, the judge of the extent to which the dissimilarity of conditions and circumstances, which competition in any given case creates, will justify or excuse difference in rates, and whether it will justify or excuse the violation of the first and second sections of the act.

Section 1 of the Act to Regulate Commerce, which prohibits unjust and unreasonable charges, and Section 2 of the act which defines what unjust discrimination consists in, are just as much in force now as they ever were before, and are not in any way affected by the decisions on the subject of competition qualifying the meaning of Section 4, the long and short haul clause. Section 14, which makes it the duty of the Commission to make findings of facts upon which its conclusions are based, is likewise in force. Under these sections, then, it is still the duty of the Commission in any given case to find whether there has been any undue preference or unjust discrimination. In its finding on this point it should, perhaps, be influenced by the fact that competition may have made the circumstances and conditions of carriage dissimilar; but, taking this into account, it still rests upon the Commission to determine whether the extent of the dissimilarity is proportional to, and, therefore, justifies the amount of the discrimination. And if not, then in spite of the existence of some dissimilarity there will still be the undue preference which is prohibited by the act, and the Commission must so find.

In this case a great deal of evidence was taken before the Commission on the subject of the comparative rates charged by the defendant on its local and through traffic. These rates were grossly dissimilar, being in the case of cutlery, for instance,

carried from New Orleans to San Francisco, four times as much per hundred pounds on local traffic as on through traffic. The Commission gave due attention to the defendant's allegation of the necessity forced upon it by alleged competition, but, considering this, it found that an undue preference and unjust discrimination had been established, and it, therefore, ordered the defendant to desist therefrom. No additional evidence to rebut this finding was taken in the United States Circuit Court, and the facts as found by the Commission must consequently be taken as established. This Court will not sit in judgment upon a matter which is left wholly within the discretion of the Commission, and that is what it is asked to do, since it is not claimed that the Commission erred in law as to its own powers, but that this Court, if the suit had originally been brought before it, might have come to another conclusion than the one at which the Commission arrived. The argument which is addressed to the Court by counsel for the defendant, therefore, has for its object to persuade it that the competitive conditions to which the defendant railway company is subjected have not been sufficiently weighed by the Commission. Will this Court, without the knowledge and facts before it, which the Commission had, not only in this case, but in the examination of the whole field of railway traffic, as it is presented from day to day, reverse the decision of the Commission upon a question of discrimination, the consideration of which is left with that tribunal by the Interstate Commerce Act? Surely not. The unjust discrimination on the part of defendant having been found as a fact by the Commission, which took all the contentions and allegations of the defendant into account, that ruling should not now be disturbed or interfered with.

Respectfully submitted,

SIMON STERNE,
JOHN D. KERNAN,
Of Counsel for the Interstate Commerce Commission.

FILED.
JAN 27 1906
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

No. ~~311~~.324.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

against

THE INTERSTATE COMMERCE COMMISSION.
Appellee.

ARGUMENT IN REPLY FOR THE COMMISSION UPON REARGUMENT.

JOHN D. KERNAN,
SIMON STERNE,
For Commission.

United States Supreme Court.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

against

THE INTERSTATE COMMERCE COMMISSION,
Appellee.

First.

The defendant is wrong in asserting (p. 12, &c., of Points) that the Commission had *no power to make the order in question,—that it is not a lawful order.*

The argument presented as to the power of the Commission to make the order in question is misleading and untenable. This is not a proceeding to enforce the general order of March 23, 1889. The order in question was made January 29, 1891, in the course of a regular investigation, based in part upon complaint, and in part upon an inquiry instituted by the Commission upon its own motion, because of allegations made against defendant by co-defendants, and because the rule of the Commission not to decide questions as to rates unless all the parties to be effected are brought before it and given a hearing.

P. 206, Secs. 13, 14 and 15, of the Act.

Whether the Commission can or cannot make a general order like that of March 23, 1889, is entirely immaterial. That order was not designed to bring parties into court for its violation; it was simply a notification to carriers of the matured conclusion of the Commission upon the import rate question.

Under Sec. 12 it is provided that the Commission "shall have *authority* to inquire into the manage-"ment of the business of all common carriers sub-"ject to the provision of this act, and *shall* keep it-"self informed as to the manner and method in "which the same is conducted;" also, "and the "Commission is hereby authorized and required to "execute and enforce the provisions of this act."

In Sec. 13 we read that "it shall be the duty of "the Commission to investigate the matter com-"plained of" (*i. e.*, by persons, &c.) "in such man-"ner and by such means as it shall deem proper."

Again, "and may institute any inquiry on its own "motion in the same manner and to the same effect "as though complaint had been made. No "complaint shall at any time be dismissed because "of the absence of direct damage to the complain-"ant."

The proceedings taken by the Commission leading up to and including the order herein of January 29, 1891, are expressly authorized by Sections 15 and 16.

If it be true, as asserted, that the Commission cannot make a lawful order as to a class of rates which severally and jointly violate the act, but must deal with each *specific violation*, then Congress greatly misunderstood what it was doing; not less than 100,000 commissioners would be overworked in looking after thousands of daily transactions. Anything to beat the law.

Second.

The claim (p. 15, &c.) that the *petition is insufficient* and that there is a *defect of parties* has been

fully answered in the points submitted and by the courts below.

The proceedings before the Commission had nothing to do with the contract relations between the defendant and the Southern Pacific.

No such contract was pleaded or involved before the Commission. Each road answered and defended its cutting of rates separately, and the decision of the Commission went against each road before it separately. Courts cannot be held up by wrongdoers upon the plea that some other participant in the crime is uncaught and out of court.

Third.

The defendant, upon p. 25 of its points, says, "*That it is settled law that a less amount per mile "can be charged for a long than for a short haul.*"

This position, if true, has no bearing here. We may assume that it would be lawful for defendant to charge a local passenger over its entire line $5, while charging a through passenger from San Francisco to New Orleans but $3 for the same service, without ~~inquiry~~ to the position of the Commission, If competitive conditions present at San Francisco can justify the lower rate to the through passenger, it is because those competitive conditions, being within the contemplation of the act and within the scope of its regulation, can lawfully be recognized.

The same rule cannot, however, be applied to import traffic under through bills, unless competitive conditions at foreign ports are also held to be lawful factors in rate-making by American carriers between the seaboard and the interior.

The Commission denies this proposition.

Again, the defendant seeks to make a use of foreign competitive conditions entirely unthought of in any cases heard by our courts hereto-

fore. The defendant contends for the right to make two rates to each place on its line which Liverpool shippers may reach by any other route, one rate based upon all competitive conditions affecting its road and arising within the United States, and another much lower rate for like service claimed to be justified by competitive conditions at Liverpool, &c.

As the result, one merchant at El Paso would pay for the transportation of clothing purchased in New Orleans the regular tariff fixed by the competition of all carriers reaching El Paso, while, a competitor merchant, purchasing in London and shipping from New Orleans to El Paso under a through bill from Liverpool, would pay a fraction of that rate for like service, the cost to the carrier being the same in each instance.

Wherever two carriers meet there will be this clashing and discrimination.

If the Court sustains the Commission in the SOCIAL CIRCLE cases, that decision will necessarily control in this case, because, if localized competitive conditions, as contended for in that case, are to be excluded in rate-making, it clearly follows that foreign competitive conditions are even more obnoxious to the law.

If, however, that decision be adverse to the Commission, the broad latitude in rate-making thereby declared lawful will not avail this defendant, unless the Court sustains the further position, to wit, that foreign competitive conditions are likewise legitimately to be considered whenever a shipment is made from abroad under a through bill issued there. The discrimination and confusion thereby certain to result at every competitive station between widely differing rates for like service and between competitors of the same class, is appalling. It is no wonder that the railroads generally accepted the decision of the Commission, and left defendant almost alone to contend for a construction of the law—bad

for shippers, bad for railroads, and bad for the law itself.

The proposition (p. 25) that "*an inquiry into the divisions of the aggregate through rate for the purpose of testing its relation to a local rate is inadmissible*," is, if true, in like manner inapplicable. The cases holding that doctrine deal with through rates, &c., upon *the lines of carriers subject to the act*, and are no authority for the proposition that the inland proportion of through rates from abroad and domestic rates for like services cannot be compared because of foreign competitive transportation conditions.

Again, there is no need of *dividing* the through rate in this case for purposes of comparison. The entire through rate is less than one-half of the local, *both* admittedly received by defendant. Whether the proportion of the joint rate is greater or less than, or equal to, the proportion of the joint inland rate is immaterial. Defendant does not assert any thing about it. The square admission (p. 162) that " " both before and since March 23, 1889, it has car- " ried imported traffic at lower rates than it has con- " temporaneously charged for like traffic originat- " ing in the United States, and admitted table 36, " showing how much lower the rates are, give all " the essential facts in the case in this regard."

Fourth.

The purpose of the act *was not to regulate commerce with foreign nations*, as assumed by defendant (p. 29, &c.).

Its entire purpose is found in the first section of the act, and was twofold:

1. To cover *carriers* within the United States as to all traffic therein carried, or carried between

points therein through Canada, whether import or domestic.

2. To cover the *transportation* of Canadian competitors between Montreal, Portland, Vancouver, &c., and interior American points.

The Canadian phase of the act emphasizes the omission in the act to attempt regulation of any other carrier, transportation or rates beyond the American seaboard, whether in themselves or when made in connection with carriers subject to the act.

It is not true, as argued (p. 31), that "*The Commission's construction of the act involves the inconsistent proposition that Congress may regulate carriage in an adjacent foreign country, but it may not regulate ocean carriage.*" It is not a question of what Congress *may* do, but of what Congress *has* done. The intimate relations of Canadian carriers with United States transportation, the physical existence of their lines and connections within our territory, and their competitive position towards our carriers, gave to Congress the practical opportunity to bring Canadian carriers within the act, to some extent at least, and impelled that body to legislate as far as possible in that direction. No such legislation against foreign railroads and steamship lines would be practical or useful, and, hence, was not attempted.

Fifth.

The defendant states (p 32) that "*throughout the statute it will be found that the transportation to which it is applicable is not alone that which the carriers subject to the act perform independently, but includes that in which they participate with carriers not subject to the act.*"

There is nothing of the kind to be found in the statute in the sense that an *entire transportation* made by two carriers, one of whom is, and the other of whom is not, subject to the act, is regulated *throughout*. There is no attempt to regulate the carrier who is *not* subject to the act at all, except Canadian carriers.

It is only that *part* of the transportation which is done by the carrier who is subject to the act, to which the act is applicable. Neither Congress nor the Commission * * * seeks to interfere with through billing to and from abroad; they only seek to hold the regulation of the act over the carriers subject to the act including Canadian carriers, in so far as they participate therein.

For instance, we read in the first section that "all charges made for any service rendered, or to be rendered, in the *transportation of passengers or property, as aforesaid*, &c., shall be just and reasonable." Is it not clear that the *transportation, as aforesaid*, is, as to import and export traffic, that between ports and the interior, which is done by carriers subject to the act, or by Canadian carriers entering the States?

In like manner Sections 2, 3 and 4 cover only carriers subject to the act, *i. e.*, carriers within the United States, or Canadian carriers who enter the States, and thus subject themselves to our laws.

Again, we find, on careful examination of Section 6, that its provisions clearly relate to *carriers subject to the act*, whether transporting alone or upon *continuous* lines formed by arrangement between them.

In the first part of the section we read that "*every common carrier subject to the provisions of* "*this act shall print and keep open to public in-*"*spection schedules showing the rates, &c.*, * * * "*in force at the time upon its route.*" There can be no question but that the foregoing and the provisions

immediately following it relate exclusively to *carriers subject to the act.*

Standing alone, its provisions would apply to all traffic, whether originating on its line, or received from other carriers of any description. No exception of traffic received from another railroad or a foreign steamer is suggested.

Next, Congress provides for subjecting freight to customs duties, unless a *carrier subject to the act* shall print, &c., like schedules of *through* rates at the point in the United States where freight is received to be carried through a foreign country to points in the United States. *Through* rates means *through* the foreign country, and carried to and from United States points by such common carrier alone, or in connection with other United States or Canadian carriers.

Read in connection with Section 1, the objects aimed at are Canadian carriers from Portland, &c., and American carriers, such as those between Buffalo and Detroit, through Canada.

Had Congress designed to include any steamer carriers upon the ocean within the act, in any wise, we would expect to find the penalties of customs duties imposed upon them here unless they posted rates in like manner at *our ports* where they receive and discharge freight.

Next, any advance or reduction of rates is forbidden, except upon notice by any common carrier covered by the section. Advance or reduction of rates by ocean steamer carriers is not hinted at, because the act has nothing to do with their carrying to and from our ports under port, or through bills to and from interior points. The act has only relation to United States and Canadian carriers, and their transportation to and from ports, whether under domestic or through bills.

It is next provided that every common carrier subject to the act is to file its schedules; also copies of all contracts, &c., *with other common carriers*

relating to any traffic affected by the act to which it may be a party.

This is broad enough to require the filing of contracts made by carriers subject to the act with ocean steamers, or their associated railroads abroad. This is a *significant* provision. Congress requires this *filing* by *carriers subject to the act*, so that the Commission may be kept informed of the facts and may compel compliance with the act by such carriers.

In other words, *such* carriers are to be regulated by the act in *all* of their contracts, whether made with carriers inside or outside of the act; at the same time, there is an entire absence of any attempt to reach or control such *other* carriers.

It is next provided as follows:

"And in cases where passengers and freight pass "over *continuous* lines or routes operated by more "than one common carrier, and the several com- "mon carriers operating such lines or routes estab- "lish *joint* tariffs of rates or fares or charges for "such continuous lines or routes, copies of such "joint tariffs shall also, in like manner, be filed "with said Commission. Such *joint* rates, fares "and charges on such continuous lines, so filed as "aforesaid, shall be made public by such common "carriers when directed by said Commission, in so "far as may, in the judgment of the Commission, "be deemed practicable; and said Commission shall "from time to time prescribe the measure of pub- "licity which shall be given to such rates, fares "and charges, or to such part of them as it may "deem it practicable for such common carriers to "publish, and the places in which they shall be "published," &c.

"No advance shall be made in *joint* rates, fares "and charges shown upon *joint* tariffs, except after "ten days notice to the Commission, which shall "plainly state the changes proposed to be made in "the schedule then in force, and the time when the

"increased rates, fares or charges will go into "effect. No reduction shall be made in *joint* rates, "fares and charges, except after three days notice, "to be given to the Commission as is above pro- "vided in the case of an advance of joint rates," &c.

"It shall be unlawful for any common carrier, "party to any joint tariff, to charge, demand, col- "lect or receive from any person or persons a greater "or less compensation for the transportation of per- "sons or property, or for any service in connection "therewith, between any points as to which a joint "rate, fare or charge is named thereon, than is "specified in the schedule filed with the Commis- "sion in force at that time," &c.

"If any such common carrier shall neglect or re- "fuse to file or publish its schedules or tariffs of "rates, fares and charges, as provided in this sec- "tion, or any part of the same, such common car- "rier shall, in addition to other penalties herein "prescribed, be subject to a writ of mandamus," &c.

These provisions are all aimed at *carriers subject to the act.* They can have no other application. They would be utterly impracticable and useless as to carriers outside of the act.

For instance, is it not reasonable to suppose that Congress knew that no notice of ten days of advance in rates was practicable as to import traffic, except upon our theory that the inland rate was to be the same for all traffic? As we argue, there is no trouble in applying the provisions as to notice, &c.; but if our opponents are right, Congress really did nothing as to import traffic, except to leave railroads to their own devices in the matter.

Congress left through bill transportation to and from abroad as it was, except that the act was to apply to the participation of carriers subject to the act therein, without any regard whatever to circumstances and conditions surrounding foreign allies, whether steamers or railroads.

An act which can by no construction be applied to steamers, certainly cannot design that the circumstances and conditions surrounding their transportation are to be considered in construing and in applying the act to carriers who are within its scope.

In Section 22, as amended, *joint* interchangeable tickets, subject to all the provisions of Sec. 6, are provided for. Between whom are these tickets to be issued that are regulated? Clearly between carriers *subject* to the act, not between United States and European or ocean carriers. Joint interchangeable tickets good from Constantinople to San Francisco were not forbidden, but by uniting therein, a carrier does not escape as to his participation therein from the limitations of the act as to what circumstances and conditions may be considered in making rates. By signing a through ticket or bill of lading, a carrier does not, as to that transaction, step outside of the act and become the creature of circumstances and conditions in foreign countries. Hence, *joint*, within the purview of Congress, means the same thing in both sections so far as the *class* of carriers is concerned, to whom the word *joint* is applied.

To attempt to stretch the word *joint* so as to cover an entire through transportation from abroad, made under a through bill issued by a carrier who *is* and by one who is *not* subject to the act, ignores the limitations of the first and sixth sections entirely, and throws the entire act into irredeemable confusion.

Certainly Congress did not intend that there should be two sets of *joint* rates under the act—one between carriers subject to the act and regulated thereby; another between carriers who are and those who are *not* within the act and under conditions which practically forbid any regulation under the act whatever.

Sixth.

The defendant asks (p. 35): "*Does this adjust-*
"*ment of rates involve a discrimination against*
"*New Orleans, or its importers, jobbers or middle-*
men?"

A large share of the burden of the defendant's plaint is centred in this question; of course, to charge one man $3.70 per 100 lbs. for transporting boots and shoes while charging another but 80 cents per 100 lbs. for like service is a gross discrimination and must hurt some one. Whether it does or not, the Commission, upon ascertaining the fact, is bound under the act to stop the wrong and compel obedience to the law. It is immaterial that no one at New Orleans has complained. No complaint is needed to set the Commission in motion, nor to establish violation of the law.

But the original complainants cared nothing about and sought no action at New Orleans. They simply tried to stop this illegal rate-cutting through their home ports of New York and Philadelphia. Upon seeing that the question affected all ports alike, and that the rule at one port must be the rule elsewhere, the Commission extended its inquiry so as to give to the carriers to and from each port a full hearing. The carriers at New York and Philadelphia accepted the decision; those at New Orleans disobeyed it. *Hence the accident of this case arising with a New Orleans carrier.*

The question is, shall all carriers from all ports transport imports to the interior upon their regular inland tariff rate adjusted to meet each other's competition, or shall each carrier from each port be at liberty to cut its inland rate to meet the competitive conditions surrounding its railroad and steamship allies abroad?

A decision of the question either way will not affect the relative position of ports at all as to import and export traffic.

If one may cut rates, all can; if one cannot, none may.

The defendant seems to think that a decision in its favor will enable it to continue cutting rates through New Orleans while its competitors for import business at other ports will maintain rates and thus drive business to New Orleans. On the contrary, under a decision against the Commission all carriers will cut rates to meet each other; under a decision against defendant none can do so. In either event the relative amount of business at ports will be practically unchanged. Upon the testimony of the general freight agent of the Penn. road the Commission (at p. 187) finds that, "*If the inland rates were maintained from all ports, there would not be any difficulty in holding such inland rates, and in the ports respectively holding their business.*"

Nothing is better settled than that trade has habits, like men; it follows certain channels; spasmodic efforts to divert it by rate cutting have little permanent effect. Whether rates be cut or maintained New Orleans will get and hold its natural share of imports just as it does of the sugar and cotton business. It can relatively get no more and no less under any circumstances, however this case goes.

Railroads as a whole will be vastly benefited by a decision sustaining the Commission; a contrary decision will reduce their revenues largely, besides creating a condition very disastrous to American manufacturers and shippers. *These latter are the real parties* to be considered in this case. Let the Court look at Table 36 (p. 78) and consider the natural and inevitable effect of permitting carriers from New York, Philadelphia, &c., to carry imported clothing from those ports to San Francisco at 80 cents per 100 lbs. in order to meet the rate through New Orleans, while charging domestic clothing manufacturers $4.20 for like service. Let the Court also consider a like condition at all points

between New York and San Francisco which a through bill can reach by more than one route.

No free-trader ever dreamed of such a superb tariff smasher as Table 36!

Seventh.

The defendant asserts (p. 39) that, "*It cannot "seriously be contended that the defendant has vio- "lated this (second) section of the act. Its rates are "open, published and available to all—equally "available to the importers of San Francisco, to "all citizens of this country, and to the foreign ex "porters to this country.*"

Nothing could be more disingenuous! How can American manufacturers and merchants avail themselves of these rates from Liverpool, &c.? To do so they must either manufacture *abroad* and ship thence under through bills to their customers in the interior of America; or, close their factories and buy their clothing abroad; or, reach Chicago by shipping their product from their factories to Liverpool and then reshipping under a through bill to Chicago, &c.!

Shippers were frequently driven to this latter method before the Inter-State Commerce Act, but that act was supposed to have cured the evil.

The discrimination in these import rates lies in the fact they are not practically available for the citizens of this country, for whom the only rates so available are those from their places of business to their customers, *i. e.*, the regular tariff rates.

Eighth.

The argument presented as to the third section is equally erroneous (p. 38).

There is no question but a preference and advantage in rates is given to import traffic under through bills. The preference, &c., must however be *undue* and *unreasonable*, and this brings us again to the question of whether competitive conditions abroad are or are not legitimate reasons for the preference, &c., under the act.

It must not be forgotten that these competitive conditions at foreign ports are the only reasons claimed to justify any difference between the inland and import tariff (p. 184).

The cases cited by defendants have no bearing whatever upon this question. Those cases all relate to competitive conditions *localized* within the conceded field of regulation.

Ninth.

The argument presented (p. 41) as to "*the division of the rate and service*" is fully answered by the Commission, at p. 194.

The order of the Commission as to the publication of *joint rates*, dated June 21st, 1887, consistently refers expressly to *joint* rates made between *carriers subject to the act.*

The order has no reference to joint rates between carriers who *are* and those who are *not* subject to the act.

The only *general* order made by the Commission as to imported traffic is that of March 23d, 1889 (p. 176). This order simply requires such traffic to be carried upon the *inland tariff governing other freights.*

Tenth.

In discussing the *tariff law* phase of the case (p. 45, &c.) the defendant localizes the whole question

at New Orleans, and erroneously assumes, since manufacturers are few in that city, that the overturning of tariff law provisions at that point by its rates is of no importance.

The defendant ignores the broad proposition that if railroads at New Orleans may thus defeat the designs of an act of Congress, railroads at every port may do the same thing.

Eleventh.

It is not true that any one proposes (p. 47) "*that "interior importers shall be deprived of the uni- "versally low through rate for continuous carriage "from the source of supply,*" &c.

The contention simply is, that for like service domestic and imported traffic shall be treated alike —neither having any preference or advantage over the other. No such proposition is involved at all as that "*through rates must not be less than the sum of the locals*" (p. 48).

The regular tariff rate is not subject to any such rule, and we simply urge that the regular tariff rate, under all the rules governing it in this and in all other respects, be applied to imported traffic. The defendant asserts (p. 50) that a rate of 70 cents is forced by ocean competition between New York and New Orleans, and that a rate of 92 cents from Lynchburgh to New Orleans, via Lynchburg, not being open to ocean competition, is reasonable. We neither affirm nor dissafirm the propriety of permitting *ocean competition between home ports* to be thus lawfully considered. That question will probably be decided in the Social Circle case. However it is decided, and whatever the rate lawfully fixed for transportation from New York and Lynchburgh to New Orleans may be, that, we insist, must be the rate for an imported consignment

passing through New York from Liverpool, as well as for a domestic shipment starting at New York.

A clear distinction to be carried in mind is that the propriety of permitting competition between home ports, or with American or Canadian rail and water lines, is not the question involved in this case. That may be a question in the Social Circle cases. The defendant asserts no such justification for its action. Its local inland rates are now fixed with reference to all such conditions. It meets our demand that its local, thus adjusted, shall apply to import traffic, not by asserting that water competition between New Orleans and San Francisco is a defense, but by insisting that it can lawfully transfer its New Orleans terminal to Liverpool and there compete with all ocean routes which can reach San Francisco. A decision sustaining the railroads in the Social Circle cases will leave the Commission still contending in this case that the tariff between the seaboard and the interior must be the same for import and domestic traffic, regardless of competitive conditions at foreign ports.

Twelfth.

The defendant argues (p. 52) that a "*line*" *within the contemplation of the 4th section can be formed by a union between Carriers who are and who are not subject to the act.* This we deny except as to Canadian carriers. Congress did not legislate for a *long line* to extend perhaps around the globe. The long and short haul clause was largely an experiment; neither in the evidence taken by the Senate Committee, nor in its report, nor in the discussion in Congress, was the idea ever suggested that the *line* referred to in Sec. 4 could be longer than could be made by *carriers subject to the act* within the State and adjacent foreign

countries. To adopt defendant's position upon this question would involve most dangerous expansion of the act by judicial construction.

Thirteenth.

The defendant insists that the Circuit Court of Appeals erred in affirming the decision below, because of the gross disparity between the rates maintained for like service; that we have no such issue as unreasonable rates, &c. When the Commission charged (p. 15) that defendant wrongfully maintained the rates in Table 36 for like service, it involved the charge that the higher rates were unjust to domestic shippers, in view of the lower rates charged imported traffic. Discrimination against domestic shippers in charging the higher rates was the gist of the complaint before the Commission. Thus challenged, defendant did not assert the reasonableness of either rate, but contented itself with insisting that competitive conditions abroad justify it in making any rate it chose to make for imported traffic in order to get business, regardless of its domestic rates. The Circuit Court of Appeals had before it the undisputed findings of fact:

1. That, except for competitive difficulties in foreign ports, there is no reason for any difference in rates.

2. That there is no appreciable difference in the cost to defendant of handling import and domestic goods of like character (pp. 184–187).

3. That two sets of rates for like service, differing vastly in amount, were maintained, for the

higher of which defendant asserted no claim of reasonableness, and no excuse except that competitive conditions abroad forced it to make the lower rate in order not to lose business.

Upon these facts the Circuit Court of Appeals could reach no other conclusion than it did.

There should be an affirmance, with provisions as to costs, counsel fees, &c., as asked in original argument, submitted for the Commission.

JOHN D. KERNAN,
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Office Supreme Court U. S.
FILED.
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CLERK.

IN THE

Supreme Court of the United States.

THE TEXAS & PACIFIC RAILWAY COMPANY,
APPELLANT,
vs.
THE INTERSTATE COMMERCE COMMISSION.

No. 321

IMPORT RATE CASE.

Reply Brief for the Railway Company.

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THE TEXAS & PACIFIC RAILWAY COMPANY,
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THE INTERSTATE COMMERCE COMMISSION.

Reply Brief for the Railway Company.

I.

The first section of the Act to Regulate Commerce provides as follows :

"That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment,

"(1) from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia,

"(2) or from any place in the United States to an adjacent foreign country,

"(3) or from any place in the United States through a foreign country to any other place in the United States,

"(4) and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment,

"(5) or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

See Trans., p. 103.

Counsel for the Commission, in their original argument (p. 8), insist that because the words "*any common carrier or carriers engaged*" are not repeated before the words "and also to the transportation," the "*carriers engaged*" in transporting import traffic under through bills, "were not to be regulated throughout the transportation, but that the only object of regulation was that part of such *transportation* lying between a port of entry in the United States, or Canada, and any interior destination."

We insist that the words "any common carrier or carriers engaged" were intended to be understood; and that the effect is the same as though they had been expressed.

Condensing the first section, and repeating those words, where, as we insist, they were intended to be understood, the condensed section would read thus:

The provisions of this act shall apply:

(1) "To any common carrier or carriers engaged" in the transportation of property from one State to another State.

(2) "To any common carrier or carriers engaged" in the transportation of property from any place in the United States to an adjacent foreign country.

(3) "To any common carrier or carriers engaged" in the transportation of property from any place in the

United States through a foreign country to any other place in the United States.

(4) "To any common carrier or carriers engaged" in the transportation of property from any place in the United States to a foreign country.

(5) "To any common carrier or carriers engaged" in the transportation of property from a foreign country to any place in the United States.

Whether the transportation be from one State to another State, or from a place in the United States to an adjacent foreign country, or from a place in the United States through a foreign country to another place in the United States, or from a place in the United States to a foreign country, or from a foreign country to a place in the United States, the regulation is the same. It begins when the transportation begins, and continues until the transportation is completed.

A shipment from Portland, Maine, to San Francisco, California, via the Canadian Pacific Railway, is subject to the regulation of our Act throughout its entire transportation, although it may be carried over foreign soil for more than 2,000 miles. And so a shipment from Liverpool to San Fancisco, via the Texas & Pacific Railway, is subject to the regulation of our Act throughout its entire transportation, although it may be carried upon the ocean for several thousand miles.

The words "shipped" and "carried" used in reference to foreign commerce, are synonymous with the word "transported." Property "shipped" or "carried" to or from a foreign country is "transported;" and carriers engaged in the shipment or carriage of such property, are engaged in its transportation, and are subject to the Act which regulates such transportation.

The words "transportation *in like manner*," used in

reference to foreign commerce, mean transportation in manner "like" the transportation of domestic commerce, as described in the first part of the section, viz: "partly by railroad and partly by water" (*i. e.*, by ocean), when both are used under a common arrangement for continuous carriage or shipment.

II.

Counsel insist, in their original argument (p. 9), that Congress did not intend "that its obvious attempt to include the inland transportation of export and import traffic under the regulation of the Act should be frustrated by the device of a union between our railroads and *unregulated* ocean carriers subject to foreign competitive conditions."

We contend that Congress intended to regulate the ocean transportation, as well as the inland transportation of export and import traffic; provided such transportation be conducted partly by rail and partly by ocean, under a common arrangement for continuous carriage.

In such a case the ocean carriers are not "*unregulated*." On the contrary, they are as completely regulated as the American rail lines with which they enter into common arrangements for continuous carriage.

As to ocean carriers being subject to "*foreign* competitive conditions," they are no more subject to such conditions than the American rail lines with which they enter into common arrangements for continuous carriage.

As to such competitive conditions being "*foreign*," there is no reason why they should not be allowed to have the same effect in transportation, as in other commercial matters. The competitive conditions in Liverpool and other foreign markets fix the price of cotton, wheat, bonds,

stocks, &c., throughout this country, whether we like it or not; and competition in freight rates at Liverpool necessarily fixes the rates, not only between that point and San Francisco, but between Liverpool and every other seaport in the world.

III.

Again counsel say, in their original argument (p. 9), "For Congress to carefully exclude regulation of ocean carriers, and then to permit the competitive conditions surrounding them abroad to control our inland rates upon imports, would be a strange incongruity."

We contend that Congress has not "excluded" ocean carriers from regulation in any case where they enter into common arrangements with our rail lines for continuous carriage. In such a case they are as much subject to the requirements of the law as are the rail lines. The joint through rates, made under such common arrangements, must be just and reasonable; they must not unjustly discriminate; they must not give any undue or unreasonable preference; they must not be greater in the aggregate for a shorter than for a longer distance over the same line in the same direction, unless the circumstances and conditions be substantially dissimilar. (See counsel's supplemental argument, p. 4.) In a word, such ocean carriers, as well as the rail lines with which they make joint rates, are subject to the Act to Regulate Commerce in all of its provisions. The competitive conditions surrounding such ocean carriers necessarily control the joint rates upon imports and exports to or from points in this country situated near the ocean; but this is so, not because such conditions are located "abroad," but because they are located at one end of a joint line. They operate with no greater force because they are located "abroad," than they would

if they were located in this country. In other words, if competition in ocean freight rates were as great at New York, as it is at Liverpool, the rates from New York to San Francisco would be as low as the rates from Liverpool to San Francisco; and an all-rail line running from New York to San Francisco would be forced to approximate those rates, or abandon the traffic.

IV.

Counsel insist in their original argument (p. 10), that steamship lines touching at American ports are not such common carriers as are subject to the provisions of the Act to Regulate Commerce; and that Congress never intended that any railroad rate should be fixed and controlled by steamship carriers "outside of the law."

The first section of the Act provides that it shall apply "to any common carrier or carriers engaged in the transportation of passengers or property" * * * "partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment," * * * and "to the transportation in like manner of property shipped" * * * "from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

The steamship lines touching at New Orleans, which make joint rates from Liverpool to San Francisco with the Texas & Pacific Railway, are common carriers engaged in the transportation of property, partly by water and partly by railroad, under a common arrangement for a continuous carriage or shipment; they are engaged in the transportation of property from a foreign country to San

Francisico, in the United States; and the property is carried to San Francisco from New Orleans, a port of entry in the United States.

Such steamship lines are therefore subject to the provisions of the Act to Regulate Commerce, and are *not* "outside of the law."

V.

Counsel insist, in their original argument (p. 9), that our construction of the Act leads to a virtual nullification of all its provisions as to the publishing of rates, and as to notice of advances, etc.

The sixth section of the Act provides that "in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made

in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates," etc.

There is no evidence that the Texas & Pacific Railway Company has failed to file with the Commission copies of its joint tariffs, showing the joint rates from Liverpool to San Francisco. There is no evidence that said company has failed to make public such joint rates in such manner as in the judgment of the Commission may have been deemed practicable. There is no evidence that said company has ever made any advance in such rates, except after ten days' notice to the Commission. And there is no evidence that said company has ever made any reduction in such rates, except after three days' notice to the Commission.

On page 78 of the Transcript will be found not only the joint rates from Liverpool to San Francisco via New Orleans, but also the ship's proportion and the railway proportion of such rates. On the same page will be found the joint rates from New Orleans to San Francisco. Those rates were in force at the date of the decision rendered by the Commission January 29, 1891.

On pages 132–133 of the Transcript will be found the joint rates from Liverpool to San Francisco via New Orleans, and also the joint rates from New Orleans to San Francisco that were in force December 30, 1891.

It is stated by the Auditor of the Commission that the rates from Liverpool, last referred to, were obtained by him from foreign freight tariffs of the Texas & Pacific Railroad. It is manifest, therefore, that it is entirely practicable to make and file with the Commission, copies of joint tariffs of rates from Liverpool to San Francisco via New Orleans, and to make the same public in such manner and at such places as the Commission may deem ad-

visable. There is no more difficulty in publishing such tariffs in Liverpool, than there is in publishing them in New Orleans or San Francisco.

It is also entirely practicable to give ten days' notice of any advance in said rates, and to give three days' notice of any reduction in said rates.

In fact, there is no difficulty connected with the advance or reduction of said rates that is not encountered every day in this country by rail lines which are in competition with steamships or sailing vessels plying between New York, and Charleston, Savannah, Mobile, New Orleans, &c. The same difficulty is also encountered every day by rail lines which compete with steamboats and barges on the Ohio, Missouri, and Mississippi Rivers.

The rates of all carriers by water are liable to fluctuate daily.

But long experience has demonstrated that there is a certain limit below which even carriers by water cannot afford to go under *ordinary* circumstances; and though in *exceptional* instances such carriers may afford to go below that limit, they cannot afford to carry any considerable proportion of their traffic, for any considerable length of time, at such exceptionally low rates.

Rail lines, in competing with carriers by water, fix the rail rates with reference to rates which carriers by water are accustomed to charge under *ordinary* circumstances, and refuse to follow *temporary* reductions made by water carriers in *exceptional* instances.

So, the Texas & Pacific Railway and the steamships with which it makes joint rates from Liverpool to San Francisco via New Orleans, fix such rates with reference to rates which competing steamship and sailing vessels are accustomed to charge, via the Isthmus or Cape Horn, under *ordinary* circumstances; and refuse to follow *tem-*

porary reductions made by such competing vessels in *exceptional* instances. There is, therefore, little difficulty in giving three days' notice of a reduction in rates, and less difficulty in giving ten days' notice of an advance in rates.

VI.

Counsel say, on page 9 of their original argument, that "if the defendant is right in asserting that it is justified, because of steamer competition at different ports, in taking what it can get out of the through rate made by the steamer, regardless of the provisions of the Act, then it follows that there can be no such thing, in through rates, under the act as unjust discrimination against domestic shippers for like service. The rates are not, by law, to be compared; they are not *in pari passu;* the conditions at Liverpool, (where rates vary *daily*) make the through importer's rate; those at New Orleans or New York, the domestic merchant's higher rate; they cannot have, and must not be expected to have, any relation to each other; the law covers the one and not the other," &c.

The Texas & Pacific Railway does not assert any such proposition. It does not claim to be justified "in taking *what it can get* out of the through rate made by the steamer."

The rates are not made by the steamer. They are made jointly by the steamer, the Texas & Pacific Railway, and the Southern Pacific Company. The Texas & Pacific Railway has at all times insisted upon receiving, as its proportion of the joint rate from Liverpool to San Francisco, an amount that under the circumstances is somewhat remunerative; and it has refused to participate in any joint rates that are not remunerative. The Commission found as a fact that "the tariff of the Texas & Pacific Railway

to California and Pacific Coast terminals, is published, and has been at that figure for a long time. The road has made that rate, and said to its steamboat connections, they can go no lower. The road loses business frequently on that account."

See Trans., pp. 81–82.

The Texas & Pacific Railway concedes that if its acceptance of its proportion of the joint rate from Liverpool to San Francisco constitutes an unjust discrimination against domestic shippers, either at New Orleans or at New York, it violates the Act to Regulate Commerce; but it denies that its acceptance of said proportion constitutes unjust discrimination against any one.

The Texas and Pacific Railway concedes that its proportion of the joint rate from Liverpool to San Francisco must bear such a relation to its proportion of the joint rate from New Orleans to San Francisco, as that each of them shall be just and reasonable, and in every respect conform to the law. But it insists that the circumstances and conditions under which the joint rate from Liverpool to San Francisco, and the joint rate from New Orleans to San Francisco are respectively made, are so dissimilar that a mere comparison between their respective amounts is very misleading, unless such dissimilarity of circumstances and conditions be kept constantly in mind.

VII.

Counsel insist, on page 10 of their original argument, that "the Act to Regulate Commerce, in its spirit and provisions, clearly, by implication, forbids a difference in rates between foreign and domestic traffic under any circumstances whatever."

There is nothing in the Act which "forbids a difference in rates between foreign and domestic traffic," unless such difference constitutes an unjust discrimination, or an undue preference.

All traffic, whether foreign or domestic, is treated alike by the Act. All rates must be just and reasonable, whether the traffic be foreign or domestic. There must be no unjust discrimination, and no undue preference, whether the traffic be foreign or domestic; but there may be just discriminations and due preferences, whether the traffic be foreign or domestic.

If the circumstances and conditions of domestic traffic are substantially dissimilar to those of foreign traffic, there must be a difference between the two traffics; for, in such case, equality would be injustice.

VIII.

Counsel say, on page 11 of their original argument, "Rather was it the intention that the steamers and ports should be left to fight their own battles, and that the railroads should devote themselves to carrying from their terminal ports such traffic as should naturally come there."

The steamers and the port of New Orleans are entirely able to fight their own battles; but it seems that the port of New York has assumed a quasi protectorate over New Orleans, and insists upon applying to her the "Monroe Doctrine."

The merchants and manufacturers of New Orleans have the good sense to know that, so far from being injured, they are greatly benefited by having the Liverpool traffic handled through that port; but New York, in the exercise of her self-assumed suzerainty, insists upon driv-

ing the traffic away from New Orleans, and diverting it in foreign vessels to the routes via Cape Horn and the Isthmus.

The Texas & Pacific Railway, in participating in the carriage of traffic from Liverpool to San Francisco, is carrying no traffic which does not come naturally to the port of New Orleans.

The route from Liverpool to San Francisco via New Orleans is shorter and quicker than the route via Cape Horn and the Isthmus.

In 1889 the importations via the Texas & Pacific Railway to the Pacific Slope, including all California and Oregon terminals, amounted to only 2,000,000 pounds (Trans., p. 80); but in 1891 the importations via the Texas & Pacific Railway to San Francisco alone, amounted to 8,165,000 pounds (Trans. p. 158).

A traffic which was more than quadrupled in the period of two years may be safely assumed to have travelled a natural route.

IX.

Counsel, on page 11 of their original argument, say: "Section 2 of the Railway and Canal Traffic Act of 1854 is, in substance, sections 3 and 4 of our Act. There is nothing else in the English Act controlling the construction of the 2d section as to this export and import question."

Counsel are in error.

The second section of our Act to Regulate Commerce was modeled upon section 90 of the English "Railways Clauses Consolidation Act (1845)," known as the "Equality Clause," a copy of which will be found in the Second Annual Report of the Interstate Commerce Commission (1888), p. 89.

The third section of our Act to Regulate Commerce was modeled upon the second section of the English "Act for the Better Regulation of the traffic on Railways and Canals" (July 10, 1854), and the eleventh section of the English "Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith." (July 21, 1873.)

The second section of the English Act of 1854 will be found in 1 Nev. and Mac., p. 2. The eleventh section of the English Act of 1873 will be found in 1 Nev. and Mac., pp. 7 and 8.

X.

Counsel, on page 12 of their original argument, refer to sub-section 2 of section 27 of the English Act of August 10, 1888, entitled "An Act for the better regulation of Railway and Canal Traffic, and for other purposes;" which provides "That no railway company shall make, nor shall the court or the Commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise in respect of the same or similar services." See 2d Annual Rep. I. C. C. (1888), p. 100.

Counsel consider the English Act of 1888 as being superfluous; but in this they are mistaken.

The English "Equality Clause" was confined to cases where traffic passed "only over the same portion of the line of railway."

The expression "passing only over the same portion of the line" was construed to mean passing between the same points of departure and arrival, and passing over no other part of the line.

4 Ry. & Can. Traff. Cases, p. 452. M. S. & L. Ry. Co. *v.* The Denaby Main Colliery Co.

4 Ry. & Can. Traf. Cases, p. 460. Murray *v.* G. & S.W. Ry. Co.

6 Ry. & Can. Traf. Cases, p. 141. The Denaby Main Colliery Co. *v.* The M. S. & L. Ry. Co.

Law Rep. 21, Q. B. (1888), pp. 217–218. L. & Y. Ry. Co. *v.* Greenwood.

If two shipments of the same quantity and description of freight were carried over the entire line of a railway, under the same circumstances, the "Equality Clause" required that they should be charged the same rate, though one of the shipments may have originated at the terminus of the railway, and the other may have originated upon the line of a connecting railway.

If the "Equality Clause" had stood alone, it would have been impossible for English railways to have made a through rate which was less than the sum of the local rates.

In order to obviate that difficulty, the "undue preferance clause" of the Act of 1854 was passed, which provides for shipments which do *not* pass "between the same points of departure and arrival."

To that class of shipments, the "Equality Clause" did not apply, and railroad companies were in the habit of discriminating unjustly between different shipments of that class.

The "Undue Preference Clause" was enacted, not to prohibit all discriminations between different shipments of that class of traffic, but only such discriminations as amounted to "an *undue* preference" of one shipment over another.

In deciding whether a preference was "undue," the difference between the competitive conditions, affecting different shipments, was a circumstance which the railway

companies had a right to take into account. And the English railways, believing that the competitive conditions under which American food products were carried to England for sale, authorized them to charge lower rates upon such products than upon English products, carried the same distance over the same railways, adopted certain rates based upon that principle.

The English Act of 1888 was passed to prohibit that practice—a practice which was entirely justifiable, under the "Undue Preference Clause."

The English Act of 1888 was passed more than a year after the passage of our Act to Regulate Commerce; and the principle underlying the Act of 1888 has not been adopted by Congress.

The argument of counsel is intended to induce the court to construe our Act as though it did contain the principle embodied in the Act of 1888.

XI.

Counsel, on page 9 of their supplemental argument, quote from a report made by the Parliamentary committee upon whose recommendation the English Act of 1888 was passed. We copy a portion of their quotation:

"Farmers complain that imported agricultural products are given a bounty over home produce, by being carried at a lower rate; that foreign corn and meat are carried from Liverpool to London for less than English corn and meat," &c.

When we remember that England is the apostle of free trade, and has been engaged for many years in attempting to proselyte the world to that doctrine, we would be somewhat surprised at such language being used by a

Parliamentary committee, if we did not also remember that it is an English peculiarity to advocate any doctrine only to the extent that it is supposed to advance the interests of that country.

The manifest object of the committee was to exclude American farmers from competition with English farmers; but neither the Parliamentary committee, nor the counsel for the Commission, have undertaken to explain how the Act of 1888 will accomplish the purpose which the committee had in view.

It appears from the transcript in this case (pp. 132–133) that the rates from London are the same as the rates from Liverpool to San Francisco; and doubtless it is true that the rates from American ports are substantially the same to London as to Liverpool.

If London be the English port of ultimate destination for American products, instead of shipping them to Liverpool, and thence by rail to London, they will be shipped by sea direct to London. The London merchant will, therefore, receive such shipments at the same rate which he paid before the Act of 1888 was passed. The railroads running from Liverpool to London will lose the American traffic, and the port of Liverpool will lose the advantages which she once enjoyed of handling that traffic. The revenue which the railroads running from Liverpool to London once derived from the carriage of that traffic, will necessarily have to be made up by increasing their rates upon their domestic traffic. And the English farmers who live along the lines of those railways between Liverpool and London, will find their rates increased, while the rates of their American competitors, via ocean to London, remain the same.

That the Parliamentary committee have been disappointed in their expectation that the Act of 1888 would

drive American farmers out of competition with English farmers, is demonstrated by the statistics in reference to fresh beef exported from this country to England. In 1887, the year before the English Act was passed, the exports of fresh beef from the United States to the United Kingdom amounted to 81,917,645 pounds. In 1890, two years after the English Act was passed, the exports of fresh beef amounted to 171,032,579 pounds.

See "Commerce with Europe 1790 to 1890," page 439.

And so in this case, if the principle which underlies the English Act of 1888 be engrafted, by judicial construction, upon our Act to Regulate Commerce, the Liverpool traffic, which has heretofore been carried via New Orleans, may be diverted from that port, and from the Texas & Pacific Railway, and a serious injury may be inflicted upon the city of New Orleans, as well as upon that railway; but we may rest assured that Liverpool cannot be driven out of the San Francisco market. Her traffic may be somewhat delayed by forcing it around Cape Horn, or across the Isthmus, but it will certainly reach San Francisco at substantially the same rates as are now charged via New Orleans. Neither can we see how the city of New York can be benefited by inflicting an injury upon New Orleans, or upon the railroads leading across the continent from New Orleans.

XII.

Counsel, on page 17 of their supplemental argument, suggest that though we cannot prevent the Liverpool traffic from being carried to San Francisco via Cape Horn, or the Isthmus, in British vessels, and at the present rates, we may at least prevent our own railroad corpora-

tions from participating in such traffic; or, to put it in the forceful language of counsel, this Government has a "right to protect its natural children from being injured by its artificial children,—the railway corporations chartered by the State,—even if it cannot protect them from being devoured by alien artificial children."

We fail to see why Liverpool is not entitled to the benefit of its natural position as a great commercial and shipping metropolis. Among those advantages is the fact that, owing to the vast number of steam and sail vessels plying to and from that port, their competition affords her exceedingly low freight rates to all quarters of the globe. Vessels frequently sail in ballast from Liverpool to New Orleans, to get return cargoes of cotton, &c. Other vessels frequently sail in ballast from Liverpool to San Francisco, to get return cargoes of wheat and other Pacific coast products. Such vessels can afford to carry freight at exceedingly low rates; and that fact enables Liverpool to obtain low rates upon such articles as she may desire to ship either to New Orleans or to San Francisco.

Liverpool ships her own merchandise, in her own vessels, upon the high seas; and, in so doing, she perpetrates no wrong upon any citizen of this country.

If Liverpool may rightfully employ British vessels to carry her traffic to San Francisco, why may not American railways rightfully engage in the carriage of the same traffic, at the same rates?

If our railways can succeed in taking that traffic away from the British vessels, it seems to us that instead of their injuring "our children," the injury is to the "alien children."

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XIII.

Counsel say, on page 17 of their supplemental brief, "The answer of the defendant, that it must do injustice to live, is very much the same as that of a French culprit in the last century, who was charged with stealing, and replied, 'I must live.' He was met with the response from the French Judge that he did not see the necessity, and was ordered to execution."

French precedents, as we understand, are of no value, even in that country; but the precedent is inapplicable, because the Texas & Pacific Railway does not claim that it must "do *injustice* to live." It insists that its action is in every respect just and lawful. It claims the right to live, not because it is a thief, but because it is honestly engaged in pursuit of the lawful business for which it was chartered.

The successful prosecution of its business will greatly advance the commercial interests of New Orleans; and it is doubtless the knowledge of this fact that prompts the desire on the part of the New York Board of Trade to have the defendant "ordered to execution."

XIV.

Counsel, on pages 17 and 18 of their supplemental argument, say that the second position taken by the defendant "is very much as though a person charged with highway robbery claimed as an excuse for his performance that he found the man on a dangerous road, which was infested with highwaymen, and that the victim has no reason to complain of the robbery by himself, because he would have inevitably met the same fate at the hands of

some one else, possibly not so favorably inclined to the victim as he was."

It is alleged in the answer of the Texas & Pacific Railway, and not controverted, that the traffic from Liverpool to San Francisco is upon orders sent by persons, firms, and corporations in San Francisco and vicinity, buying direct from first hands in London, Liverpool, and other European markets.

See Trans., p. 159.

It is conceded by the Circuit Court that the Texas & Pacific Railway would lose the traffic by reason of the competition via Cape Horn and the Isthmus, were it not that said railway offers rates which, while somewhat remunerative to it, are sufficiently low to induce the San Francisco merchants to prefer to route their shipments via New Orleans.

See Trans., pp. 163, 164.

We fail to see why a carrier should be charged with "highway robbery" because it renders acceptable service to its customers at lower rates than are charged by its competitors.

We suspect that the charge of "highway robbery" is really based upon the fact that a certain portion of the traffic is diverted by the Texas & Pacific Railway from the port of New York to the port of New Orleans.

XV.

Counsel, on page 19 of their supplemental argument, put the case of two manufacturers, both of whose factories are located at New Orleans. One of them has secured for his factory natural advantages of situation by reason, perhaps, of water-power. He has also large capital, in-

telligence, industry, and shrewdness. His rival has an unfavorable position, no natural advantages, a badly planned factory, inadequate capital, and antiquated methods. The market of both for the consumption of their product is San Francisco. Counsel then ask the question: may the railway company, because the circumstances of production are different, carry the goods of B at half the price at which the goods of A are carried? Our answer is, no.

In the case supposed, the "Equality Clause" would apply. The goods would pass "only over the same portion of the line of railway, under the same circumstances." Whatever competitive conditions might exist between New Orleans and San Francisco, whether by rail or by water, would affect the goods of one of the manufacturers as much as it would the goods of the other. But, if one of the manufacturers was located at New Orleans, where both rail and water competition exist, and the other was located at a point on the Texas & Pacific Railway 100 miles west of New Orleans, where there is no water competition, and no other railway, the company would have the right to charge less from New Orleans than from the interior point. The "Equality Clause" would not apply, because the shipments would not pass "*only* over the same portion of the line"; or, in other words, they would not pass "between the same points of departure and arrival." The "Undue Preference Clause" would not apply, because the preference would not be undue, if it was forced upon the company by the competitive conditions which exist at New Orleans, but do not exist at the interior point.

So, if one of the manufacturers was located at Liverpool, and the other was located at New Orleans, neither the "Equality Clause," nor the "Undue Preference Clause" would apply.

The Southern Pacific Company, whose road extends from San Francisco to Fort Worth, the Texas & Pacific Railway Company, whose road extends from Fort Worth to New Orleans, and the Harrison Steamship Line, whose steamers ply between New Orleans and Liverpool, have united in a joint through tariff, known as "Foreign Freight Tariff No. 35," for the transportation of freight from Liverpool, England, to San Francisco.

See Trans., p. 62.

They are therefore common carriers, engaged in the transportation of property, partly by railroad and partly by water, under a common arrangement for the continuous carriage or transportation of property from a foreign country to San Francisco, in the United States, and which property is carried to San Francisco from New Orleans, a port of entry in the United States.

The formation of such a joint through line is expressly authorized by the first section of the Act to Regulate Commerce; and, as held by the U. S. Circuit Court of Appeals in the case of C. & N.W. Ry. Co. *v.* Osborne, the companies thus united in said joint through tariff have formed for the connected roads and steamships, a new and independent line, which is entirely distinct from the rail line running from New Orleans to San Francisco. Joint through traffic received by this new and independent line at Liverpool, does not pass "*only* over the same portion of the line," nor even over the *same line*, as goods received at New Orleans; nor do they pass "between the same points of departure and arrival." The "Equality Clause," therefore, would not apply. The "Undue Preference Clause" would not apply, because the preference given to Liverpool is forced upon the line by competitive conditions which exist at Liverpool, but which do not exist at New Orleans.

See 10 U. S. App. 436–7. C. & N.W. Ry. Co. *v.* Osborne.

63 Fed. Rep. 905. Parsons *v.* C. & N.W. R.R.

53 Fed. Rep. 230. U. S. *v.* Mellen.

XVI.

Counsel, on page 6 of their supplemental argument, say, "The Commission may take into consideration all the questions which are raised here as to relieving the railway company of the necessity of compliance with the long and short haul clause, but the carrier may not take those same questions into consideration himself. He is bound, in the absence of a permission from the Commission, to adhere rigidly to the rule laid down by the Act."

It is true that the rates from New Orleans to San Francisco are greater than the rates from Liverpool to San Francisco; but the rates from Liverpool are not charged by the *same line* as are the rates which are charged from New Orleans to San Francisco. As shown above, the joint through line from Liverpool to San Francisco is a new and independent line, which is entirely distinct from the rail line from New Orleans to San Francisco.

But if the lesser charge for the longer distance were made by the same line, it would not violate the long and short haul clause, unless the competitive circumstances and conditions at Liverpool are substantially similar to those at New Orleans.

It was held by the Commission that "the carrier must judge for itself what are the substantially similar circumstances and conditions," * * * "since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law.

See 1 I. C. C. Rep., pp. 59–60. *In re* L. & N. R.R. Co.

Again, the Commission says, "Both Houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, where the circumstances and conditions of the traffic were affected *by the element of competition*, and where exceptions might be a necessity if the competition was to continue. And water competition was, beyond doubt, especially in view.

1 I. C. C. Rep., pp. 77–78. *In re* L. & N. R.R. Co.

Again, the Commission says, "The charging or receiving the greater compensation for the shorter than the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, *since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated.*"

See 1 I. C. C. Rep., p. 57. *In re* L. & N. R.R. Co.

The Commission, in all of its decisions, has held that water competition, or competition with foreign railroads, may make out the dissimilarity of circumstances and conditions which will authorize a carrier to charge less for the longer than for the shorter distance.

See 1 I. C. C. Rep., p. 3. *In re* L. & N. R.R. Co.

5 I. C. C. Rep., p. 607. Gerke Brewing Co. *v.* L. & N. R.R. Co.

5 I. C. C. Rep., 387. Ga. R.R. Comm. *v.* Clyde S. S. Co.

50 Fed. Rep. 300–301. I. C. C. *v.* A. T. & S. F. R. R. Co.

31 Fed. Rep. 319. *Ex parte* Koehler.
23 Fed. Rep. 533. *Ex parte* Koehler.
56 Fed. Rep. 925. I. C. C. *v.* C. N. O. & T. P. Ry. Co.

XVII.

His Honor, Judge Wallace, in the circuit court, said: "The Inter-State Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely on the ground that unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them, unless given exceptional rates, to justify that one in making the discrimination in his favor on the ground of the necessity of the situation."

See Trans., p. 165.

His Honor is clearly right in all cases where the "Equality Clause" applied. But, as shown above, the "Equality Clause" did not apply, except where the goods pass "only over the same portion of the line," or, in other words, where they pass only "between the same points of departure and arrival."

His Honor refers to the case of Harris *v.* Cockermouth and Workington Ry. Co., 3 C. B. (N. S.) 693.

In that case, the plaintiffs shipped coal over the defendant's railway, as did also certain tenants of Lord Lonsdale. The shipments were made from different local grouped stations, but they were all made from the same district. The stations were all within half a mile of each other; for all practical purposes, the shipments all passed "between the same points of departure and arrival," and

only "over the same portion of the line." The case therefore fell within the "Equality Clause," which has no application to a case like this, where the shipments are not from the same point of departure. As explained above, where shipments pass only "betwen the same points of departure and arrival," whatever competitive conditions affect one shipment necessarily affect every other. But, where either the points of departure differ, or the points of arrival differ, the competitive circumstances and conditions may differ very widely. Chief Justice Cockburn recognized this fact in his opinion in the Harris case. He said: "I quite agree that this court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. As, for instance, in respect of *terminal* traffic, there might be *competition* with another railway," &c.

See Harris *v.* Cockermouth R.R. Co., 1 Nev. & Mac. 102–3.

His Honor, Judge Wallace, also referred to the case of Evershed *v.* L. & N. W. Ry. Co. (2 L. R. Q. B. 254).

In that case also, the shipments were "between the same point of departure and the same point of arrival," and passed "only over the same portion of the line." The House of Lords, in referring to the Evershed case, states that the goods were carried "only over the same portion of the line." See the report of the Denaby Main Colliery case in 6 Ry. & Can. Traf. Cases, pp. 133–141.

His Honor, Judge Wallace, was led into his error by overlooking the fact that both of the cases cited by him were controlled by the "Equality Clause," which has no application unless the points of departure and arrival are the same.

His Honor, in holding that a carrier cannot justify a difference in rates where such difference is forced upon it by water competition, is in conflict with the decisions of the Commission, and of the other Circuit Courts, referred to in Sec. XVI above.

We suppose His Honor's attention was not called to the decision of the English Court of Appeals in the case of the Exrs., &c., of Pickering Phipps *v.* L. & N. W. Ry., Law Rep. (1892), 2 Q. B., p. 229. That case was decided in March, 1892, and Judge Wallace's opinion was delivered in October, 1892.

In the Phipps case Lord Herschel said: "I cannot but think that a lower rate, which is charged from a more distant point by reason of a competitive route, is one of the circumstances which may be taken into account," &c. (See p. 245.)

XVIII.

Judge Shipman, in his opinion in the Court of Appeals in this case, referred to the case of Phipps *v.* L. & N. W. Ry. Co., and said: "Assuming that ocean competition can create a dissimilar condition, which is to be considered in determining whether discriminations against particular classes of traffic are unjust, and is a fact to be taken into account in determining whether a particular traffic is subjected to an unreasonable disadvantage, does this condition justify the great disparity in rates in this case?

While it is true that under sections 2 and 4 of the statute, substantially dissimilar conditions may justify dissimilarity in rates, it does not follow that any dissimilar conditions, of whatever kind it may be, justifies any discrepancy in rates."

See Trans., p. 178.

As we understand His Honor, a dissimilarity in rates ought to bear some fair relation to the dissimilarity in conditions.

We entirely agree with him.

If the dissimilarity of conditions consists merely of a difference in *cost of service* to the carrier, then the difference in rates ought to be proportioned to the difference in *cost of service*. In other words, if the *cost of service* is to be adopted in this country as the sole basis for making railway rates, then, if any one can discover a method by which the *cost of service* in each instance can be accurately ascertained, the process of rate-making will be greatly simplified, and reduced to a mere matter of arithmetic.

The difficulty of ascertaining the *cost of service* has been well stated by the Commission: "First of all, when it is undertaken, there must be an apportionment between the passenger traffic and the freight traffic; and if we suppose this to be made with reasonable accuracy, there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety; some heavy, some light, some in large packages, some in small; some perishable or of special value and requiring peculiar accommodations and care; it is picked up in varying quantities, at numerous stations, to be carried differing distances, sometimes on fast trains and sometimes on slow. The service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road, and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost, therefore, would at the best and under the most favorable circumstances, only reach an approximation.

This is so well understood the world over that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of the carriage solely have always been abandoned after investigation."

1 An. Rep. I. C. C. (1887), p. 70.

The difficulty in using cost as a basis for rate-making, even if the actual cost could be fairly approximated, has been equally well stated by the Commission. It says: "It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value.

"On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which, within small bulk or weight concentrate great value would on that system of making them, be absurdly low; low when compared to the value of the articles, and perhaps not less so when the compari-

son was with the value of the service in transporting them."

1 An. Rep. I. C. C. (1887), p. 30.

If it has been found, the world over, that it is impossible to measure the charges of a carrier by the *cost of service*, we suppose that Judge Shipman did not intend by the expression "dissimilar conditions" to refer to a dissimilarity in the *cost of service*.

In comparing the rates charged from New Orleans to San Francisco on a car-load of coal, with the rates charged over the same line upon a car-load of diamonds, no one would contend that the difference in rates should be in proportion to the difference in *cost of service*. In such case the difference in *cost of service* would not exceed the cost of insuring the diamonds, whereas the rate upon diamonds would be many times greater than the rate upon coal.

If the *cost of service* ought not to be adopted as a standard of comparison between two shipments, both of which originate at New Orleans, it ought not to be adopted as a standard of comparison between shipments one of which originates at New Orleans, and the other at Liverpool.

As the *cost of service* cannot be used as a standard of comparison, the *value of service* has been suggested as a proper standard. The Commission says: "It was, therefore, seen not to be unjust to apportion the whole cost of service among all the articles transported upon a basis that should consider the relative *value of the service* more than the relative cost of carriage. Such method of apportionment would be best for the country, because it would enlarge commerce and extend communication; it would be best for the railroads, because it would build up a large business,

and it would not be unjust to property-owners, who would thus be made to pay in some proportion to benefit received."

1 An. Rep. I. C. C. (1887), p. 31.

If, then, we accept the *value of service* as a proper standard of comparison, we must ascertain what is the value of transportation service from Liverpool to San Francisco, as compared with the value of transportation service from New Orleans to San Francisco.

The value of transportation service is determined, like the value of everything else, viz: by what it will bring in the market.

A Liverpool merchant desiring to ship a cargo to San Francisco applies to Liverpool ship brokers to know their rates. Competition among those brokers fixes the rate, and the service is worth to the Liverpool merchant no more than the lowest rate offered.

A New Orleans merchant desiring to ship to San Francisco applies to ship brokers and railway agents who do business at that port to know their rates. Competition among those brokers and agents fixes the rate, and the service is worth to the New Orleans merchant no more than the lowest rate offered. Compare the value of the service from Liverpool to San Francisco, with the value of the service from New Orleans to San Francisco, as thus ascertained, and the relative rates which should obtain from Liverpool and New Orleans, respectively, to San Francisco will be determined. It will be found that the value of the service from Liverpool to San Francisco is very much less than the value of the service from New Orleans to San Francisco; because the shipping at Liverpool is very much greater than at New Orleans.

The rates charged by the Texas & Pacific Railway, from

New Orleans to San Francisco, are certain differentials higher than rates charged by steamships or sailing vessels, between the same ports; but it is impossible for that railway to maintain a line of rates from New Orleans to San Francisco very much in excess of the rates charged by steamers and sailing vessels. And, as the rates charged by steamers and sailing vessels are the lowest charged by any known means of transportation, we may rest assured that the railway rates cannot be unreasonably high, though they may be considerably higher than the rates from Liverpool.

XIX.

Judge Shipman says: "In this case it may fairly be presumed that the joint rates (*i. e.*, from Liverpool to San Francisco) gave each road (*i. e.*, the Texas & Pacific Railway and the Southern Pacific Company) something more than the cost of movement, leaving repairs, interest upon floating debt, and all fixed charges to be paid by the rates upon some other traffic. The rates were not entirely unremunerative, and if so, the much larger rates placed upon domestic traffic not only compelled it to bear an undue burden, but gave the company an unwarranted return."

See Trans., p. 178.

A railway company would, if it could, arrange its rates so that each article transported would pay not only the cost of its own movement, but also its fair share of repairs, interest upon floating debt, other fixed charges, and dividends; but it has been found that a very large per cent. of the railway traffic of this country cannot afford to pay its fair proportion of all those charges; and if the principle is to be announced in this case that railway companies must not accept rates upon any class of traffic unless they

will pay not only the cost of movement, but also a fair proportion of repairs, interest upon floating debt, other fixed charges, and dividends, the companies will be compelled to abandon an immense volume of low-class traffic, the movement of which is absolutely essential to the prosperity of the country.

It must be manifest, upon reflection, that if a class of traffic pays something more than the cost of its own movement, and is a traffic which the railway company could not get at any higher rate, its carriage by the company does not impose any additional burden upon other classes of traffic; and such revenue as the company may derive from it is that much clear gain.

The Commission finds and reports in this case, "That the proportion the Texas & Pacific Railway receives of the through rate, is remunerative. The preponderance of its empty cars go north during eight months of the year, and anything is regarded as remunerative that can be obtained to put in these cars to pay mileage."

See Trans., p. 81.

Of course, all traffic of the same class originating at New Orleans, destined to San Francisco, must be charged the same rate; because it passes "only over the same portion of the line," and "only between the same points of departure and arrival." It, therefore, would not be permissible for the Texas & Pacific Railway to charge one shipper at New Orleans a rate which was but little in excess of the cost of movement, and charge another shipper at the same place a very much higher rate on the same class of goods between the same points. As stated above, whatever competitive conditions may exist between New Orleans and San Francisco, affect the one shipment as much as the other, and, therefore, the two shipments are entitled to the same rate.

But traffic from Liverpool, destined to San Francisco, is governed by different competitive conditions. It can go by other routes than New Orleans, and will go by other routes, if the Texas and Pacific Railway charges higher rates upon that traffic than are offered by other routes.

As the traffic from Liverpool will reach San Francisco by other routes, at the same rates as are charged by the Texas & Pacific Railway, no merchant at New Orleans is injured by allowing the Texas & Pacific Railway to carry the traffic at anything above the cost of its own movement. How can it possibly benefit the merchants of New Orleans to compel the Texas & Pacific Railway to haul more than one-half of its cars, empty, two thousand miles across the continent, during a period of eight months in the year? If it were possible to prevent the Liverpool traffic from reaching San Francisco at the same rates as are charged by the Texas & Pacific Railway, we could see a good reason for prohibiting that company from accepting such rates; but as the Liverpool traffic cannot be kept out of San Francisco, it seems to us that to require the Texas & Pacific Railway to haul its cars, empty, three-fourths of the time, is to inflict upon it a serious injury, without benefiting any one else.

XX.

The second position assumed by His Honor, Judge Shipman, is that if the rates which the Texas & Pacific Railway accept upon the traffic from Liverpool to San Francisco are remunerative, the much larger rates charged on traffic from New Orleans to San Francisco must be unreasonably high.

There was no charge made in the petition filed by the New York Board of Trade, that the rates from New

Orleans to San Francisco were unjust or unreasonable, in and of themselves.

The Commission, in its report, did not find that said rates were unjust and unreasonable in and of themselves; and there is no testimony to that effect in the record.

The court judicially knows that there are several transcontinental railway lines which extend from the Atlantic to the Pacific. One of them is located in Canada. Steam and sail vessels ply between the Atlantic and Pacific coasts. Some of them go around Cape Horn, and some transship at the Isthmus. The competition between the various transcontinental railways, and the competition between those railways and the steamships and sailing vessels referred to, may be safely relied upon to establish reasonably low rates between the Atlantic and Pacific coasts; and, as New York has shipping facilities by both rail and water, superior to those of any other Atlantic port, we may safely assume that rail rates from New York to San Francisco are reasonably low.

Now, by reference to page 78 of the Transcript, it will be found that the rail rates from New Orleans to San Francisco are lower than the rail rates from New York to San Francisco on every article mentioned in the table. The same table shows that the rail rates from New Orleans to San Francisco are also lower than the rail rates from Chicago to San Francisco on every article mentioned in it.

It has been held by the Commission that where a complaint charges that rates are excessive, the burden of proof is upon the complainant to establish the charge.

See 1 I. C. C. Rep. 104. Fulton *v.* C. St. P. M. & O. R.R.

But, as shown above, the complaint in this case con-

tains no charge that the rates from New Orleans to San Francisco were unjust or unreasonable in and of themselves. There was no evidence to that effect; and a comparison between those rates, and rates from New York and Chicago respectively to San Francisco, show that the rates from New Orleans are reasonably low.

The traffic of every railway is classified. The classifications in this country are said to contain several thousand articles.

The freight charges necessarily vary within wide limits. They are said to vary from ten cents per ton per mile on first-class freight carried over only a few miles of road, to three and one-half mills per ton per mile on long-haul coal and mineral traffic.

It cannot be assumed that because a railway company accepts three and one-half mills per ton per mile for transporting coal, a rate of ten cents per ton per mile for transporting first-class freight gives to the company an unwarranted return upon its investment. Neither can it be assumed that because the rate of three and one-half mills per ton per mile on coal pays but little more than the cost of movement, a rate of ten cents per ton per mile compels first-class goods to bear an undue proportion of the expenses of the company.

So in this case the fact that the Texas & Pacific Railway, in order to secure Liverpool traffic which would go by other routes, accepts rates which pay but little more than the cost of movement, by no means furnishes conclusive evidence that the higher rates charged from New Orleans to San Francisco give the company an unwarranted return upon its investment; or that such higher rates compel the New Orleans traffic to bear an undue proportion of the expenses of the company.

XXI.

The mere fact that the rates from New Orleans to San Francisco are considerably higher upon certain articles than are the rates from Liverpool to San Francisco upon the same articles, by no means establishes the charge that the commerce of New Orleans is injuriously affected, or prejudiced.

Judge Wallace refers to the fact that the rate from Liverpool to San Francisco on books is $1.07 per 100 pounds, while from New Orleans to San Francisco it is $2.64. The difference between those rates is $1.57 per 100 pounds. The difference between the Liverpool rate and the New Orleans rate would amount to less than 16 cents in the selling price of a family Bible worth $10.00, and weighing 10 pounds.

Judge Wallace refers to the fact that the rate from Liverpool to San Francisco on carpets is $1.07 per 100 pounds, while from New Orleans to San Francisco it is $2.88. The difference between those rates is $1.81 cents per 100 pounds. The difference between the Liverpool rate and the New Orleans rate would amount to less than $1.00 in the selling price of a carpet worth $100.00, and weighing 50 pounds.

Judge Wallace refers to the fact that the rate from Liverpool to San Francisco on cutlery is $1.07 per 100 pounds, while from New Orleans to San Francisco it is $3.26. The difference between those rates is $2.19 per 100 pounds. The difference between the Liverpool rate and the New Orleans rate would not amount to three-tenths of a cent in the selling price of a pocket-knife worth $1.00 and weighing one-eighth of a pound.

There are a large number of high-class articles, upon

which the rate is apparently high; but when the rate is compared with the value of the article, it constitutes such an inconsiderable proportion of its selling price that it is practically disregarded by the merchant, as well as by his customer.

It is evident that a Liverpool merchant could not drive a New Orleans merchant out of competition at San Francisco by a difference in rates, which, though considerable in itself, constitutes so small a proportion of the selling price of the articles referred to.

But New Orleans merchants do not expect to be able to buy goods in Liverpool and resell them in San Francisco; for San Francisco is an important seaport, as well as New Orleans, and she can, and does buy goods direct from Liverpool, and import them either by all water, or by rail and water routes.

There is no evidence in the record that books, cutlery, or carpets are manufactured to any considerable extent, if at all, in New Orleans; and therefore there are no manufacturers of such articles at New Orleans to compete with manufacturers at Liverpool.

XXII.

Counsel insist, on page 16 of their original argument, that to permit railroads to carry imports for foreigners at a lower rate for like service than for citizens, is, in effect, to permit railroads to nullify the protective features of the tariff act to the extent of the difference.

It is a novel idea to compare railroad rates to tariff duties.

Railroad rates are not taxes, duties, or imposts. They are charges for services rendered in the transportation of

property over improved highways. (119 U. S. 548, Huse *v.* Glover.)

The Commission, on March 23, 1889, made an order to the effect that imported traffic shall be carried from the point where it enters the United States, into the interior, "on the inland tariff covering other freights." (Trans., p. 105.)

The object of this proceeding is to enforce that order. Imported traffic may enter the United States from any of the ports upon the lakes, the Atlantic Ocean, or the Gulf of Mexico. The "inland rates" from those various ports, to any given point in the interior, would naturally differ; and according to the theory of counsel we would have as many tariff laws in force as there happened to be different inland rates.

XXIII.

Counsel, on page 16 of their original argument, say that it is a circumstance worthy of note that all the principal trunk lines of the country accepted the decision of the Commission, except those running from New Orleans and San Francisco. They insist that it is evidence of the practical propriety of the Commission's position on the question, and that those most interested in the decision concede its justice.

It appears that the Pennsylvania Railroad made rates on import traffic as far west as the Missouri River (Trans., p. 97), and that the Baltimore & Ohio R.R. did not make rates on import traffic west of a line drawn from St. Louis to Chicago.

All important points on the Missouri and Mississippi Rivers are reached by barge lines from New Orleans, connecting direct with ocean steamers; and the competition

afforded by that all-water line from Liverpool may account for the willingness of those two roads to abandon the business, and "concede the justice of the Commission's decision."

See Trans., p. 101.

The Canadian roads seem to have complied with the letter of the order made by the Commission; but they did it by resorting to the device of selecting out of several hundred articles which they had previously carried in the 6th class, fourteen articles which were articles of import traffic, and placed them in a special, or commodity tariff. They then reduced the rates on those articles so as to charge the same, whether they were imported or not; but the several hundred other articles which had been carried in the 6th class, were allowed to remain in it at the former rate. The result was that the articles of import traffic which had previously been charged the same rate as other articles in the 6th class, were given a reduced and preferential rate, merely because they were imported articles, while the other articles in that class were continued at the former higher rate.

The Commission approved the device, and we are not surprised that those roads "concede the justice of the Commission's decision." (Trans., pp. 120–123.)

XXIV.

The Commission reports that "If the inland rates were maintained from all ports, there would not be any difficulty in holding such inland rates, and in the ports respectively holding their business." (Trans., p. 97.)

This would be true from the ports to inland points not reached by water lines, but it cannot be true with reference

to interior points situated upon navigable rivers. To illustrate:

The rates between London, Liverpool, and other European points, to Mississippi, Ohio, and Missouri River points, are established and fixed by steamships and sailing vessels from Europe to New Orleans, and thence by steamboat and barge lines to those points. As late as February 15, 1892, responsible European steamship companies were quoting rates from Liverpool to Kansas City, Omaha, and St. Louis, which were so low that the Texas & Pacific Railway was forced to cancel its Foreign Tariffs to those points, and to abandon a traffic which, in 1891, amounted to 17,242,632 pounds, and which it had previously been able to carry at a substantial profit. (Trans., p. 159.)

Neither can the finding of the Commission be true where the destination of traffic, as in this case, is to points like San Francisco, which are located on or near the ocean. It is manifestly impossible for American rail lines to get any part of such traffic, if they charge upon it rates which are entirely fair and reasonable for their ordinary domestic traffic.

Respectfully submitted.

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APPENDIX.

I.

The First Section of the Act to Regulate Commerce.

The first section enacts that "All charges made for any service rendered or to be rendered, in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be *reasonable and just;* and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

24 U. S. Stat. at Large, page 279.

II.

The Second Section of the Act to Regulate Commerce.

Section 90 of the English "Railways Clauses Consolidation Act (1845)," known as the "Equality Clause," is the model from which the second section of the act to regulate commerce was adapted.

For the convenience of the court the English "Equality Clause," and the second section of the act to regulate commerce are here published in parallel columns.

EQUALITY CLAUSE.

English Act.

SEC. 90. Railway clauses act 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; *provided*, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the line of railway under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."—*Second Annual Rep. I. C. C.* (1888), *page* 89.

UNJUST DISCRIMINATION CLAUSE.

American Act.

SEC. 2. Act to regulate commerce, 1887.

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."—24 *U. S. Stat. at Large, pages* 379 *and* 380.

III.

The Third Section of the Act to Regulate Commerce.

Section 2 of the English "Act for the better regulation of the traffic on Railways and Canals" (10th July, 1854), and the 11th Section of the English "Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith" (21st July, 1873), contain certain provisions from which the third section of the act to regulate commerce was modeled.

For the convenience of the court, we print in parallel columns so much of said sections as are material for the present purpose:

UNDUE PREFERENCE CLAUSE.

English Act.

SEC. 2. Railway and canal traffic act, 1854.—1 *Nev. & Mac., p.* 2.

SEC. 11. Railway and canal traffic act, 1873.—1 *Nev. & Mac., p.* 11.

. . . And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.—1 *Nev. & Mac., p.* 2–11.

UNDUE PREFERENCE CLAUSE.

American Act.

SEC. 3. Act to regulate commerce.

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat. at Large, p.* 380.

IV.

The Fourth Section of the Act to Regulate Commerce.

We here print, for the convenience of the court, the 4th section of the "Cullom Bill," S. 1532, as it originally appeared, and the 4th section of the Act to Regulate Commerce, as it was finally passed.

4TH SECTION OF THE "CULLOM BILL," S. 1532, AS IT ORIGINALLY APPEARED.

"That it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or property subject to the provisions of this Act for a shorter than for a longer distance over the same line, in the same direction (and from the same original point of departure): Provided, however, that upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time (make general rules covering exceptions to any such common carrier, in cases where there is competition by river, sea, canal, or lake, exempting such designated common carrier in such special cases from the operation of this section

4TH SECTION OF THE ACT TO REGULATE COMMERCE, AS IT WAS FINALLY PASSED.

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or *of like kind of* property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line, in the same direction, *the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance:* Provided, however, That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, *after investigation by the Commission*, e authorized to charge less for longer than for shorter distances for the transportation of passengers or

of this Act; and when such exceptions shall have been made and published they shall have like force and effect as though the same had been specified in this section.")

property; and the Commission may from time to time *prescribe the extent to which such designated common carrier may be relieved* from the operation of this section of this Act."

We print in parallel columns the material prohibitory words of the 4th section of the act, as finally passed, omitting from the left column the phrase, "under substantially similar circumstances and conditions."

WITHOUT THE PHRASE.	WITH THE PHRASE.
"It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance."	"It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property *under substantially similar circumstances and conditions* for a shorter than for a longer distance," etc.